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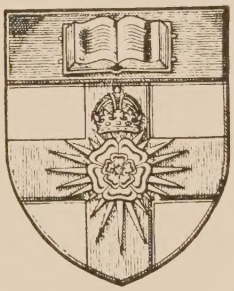

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LAW REPORTS.

Court of Queen's Bench.

REPORTED BY

WILLIAM MILLS AND HENRY HOLROYD,
BARRISTERS-AT-LAW.

AND

In the Bail Court,

BY

E. A. C. SCHALCH,
BARRISTER-AT-LAW.

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JAMES REDFOORD BULWER, Q.C.

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CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH,

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

MICHAELMAS TERM, XXXII VICTORIA.

ROWE *v.* HOPWOOD.

1868
Nov. 4.

Infant—Ratification of Contract under 9 *Geo.* 4, *c.* 14, *s.* 5.

Goods having been supplied by the plaintiff to the defendant whilst he was an infant; when he came of age an account with the items and prices was submitted to him, at the foot of which he signed the following: "Particulars of account to the end of 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory":—

Held, that this did not amount to a recognition of the debt as an existing liability so as to be a ratification of the contract within 9 Geo. 4, c. 14, s. 5.

DECLARATION for goods bargained and sold and goods sold and delivered.

Plea (amongst others) that the defendant, when the goods were supplied, was within the age of twenty-one years.

Replication that the defendant, after he attained the age of twenty-one years and before action, by a writing made and signed by him, ratified and confirmed the debts and promises in the declaration mentioned.

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ROWE v. HOPWOOD.

At the trial at the last assizes for the county of Cambridge, before Cockburn, C.J., it appeared that the defendant was under age at the time the plaintiff had supplied wine to the defendant, during the years 1866 and 1867; but after the defendant came of age, the plaintiff in January, 1868, had an interview with the defendant about his account, and produced his bill, containing the items of the wine supplied, at the foot of which he had written as follows: "Particulars of account to end of year 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory." And to this, at the request of the plaintiff, the defendant signed his name.

It was contended on behalf of the plaintiff that this memorandum amounted to a ratification of the contract within the meaning of 9 Geo. 4, c. 14, s. 5 (1), but the Chief Justice was of a contrary opinion. The jury having found a verdict for the defendant, leave was reserved to the plaintiff to move to enter the verdict for him.

O'Malley, Q.C., moved accordingly. By 9 Geo. 4, c. 14, s. 5 (1), there must be a promise or a ratification of a prior contract in writing. The construction put on this section in *Harris* v. *Wall* (2), is that any instrument signed by the party, which in the case of adults would amount to the adoption of the act of a person acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification. Applying that test to the present case the writing amounts to a ratification. To bar the Statute of Limitations there must be a new promise or an acknowledgment from which a promise may be implied, but under s. 5 a bare acknowledgment is a sufficient ratification. The Court of Exchequer expressly draws the distinction between a promise and a ratification. It is not necessary that the writing should contain the name of the debtor or any date: *Hartley* v. *Wharton.* (3)

(1) 9 Geo. 4, c. 14, s. 5:—"No action shall be maintained whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith."

(2) 1 Ex. 122.

(3) 11 Ad. & E. 934.

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COCKBURN, C.J. I think there ought to be no rule. The statute 9 Geo. 4, c. 14, s. 5, requires a ratification in writing of a debt incurred by a person under age, and the written document necessary as the foundation of an action against the debtor after he has attained his majority is for the court and not for the jury. Therefore, it is for us to say whether this written document is a sufficient ratification. I think it is not; for I entirely concur in the view adopted by the Court of Exchequer in *Harris* v. *Wall* (1), that in order to be a ratification there must be a recognition, by the debtor after he attained his majority, of the debt as a debt binding upon him. Is this document such as to amount to a recognition of an existing liability, or, to use the words of the statute, a ratification of the debt? I do not think that it is. What it comes to is this: an account is submitted to the defendant, after he is of full age, which contains a statement of goods supplied during his infancy; he is asked to sign it, and he puts his signature to the words, "I certify the account to be correct and satisfactory." I understand these words to mean that the items are properly set out and the sums charged in respect of those items satisfactory. I do not think the words mean more than that. There ought to be at least on the part of the debtor an admission of an existing liability, and we ought not to strain the meaning of the words in the document signed by the debtor, so as to defeat the operation of the statute passed for his protection.

LUSH, HANNEN, and HAYES, JJ., concurred.

Rule refused. (2)

Attorney for plaintiff: *W. B. Tarrant, for Whitehead, Cambridge.*

(1) 1 Ex. 122. (2) See *Mawson* v. *Blane*, 10 Ex. 206; 23 L. J. (Ex.) 342.

1868
Nov. 12.

IN THE MATTER OF A PLAINT OF ELSTON *v.* ROSE.

County Court, Jurisdiction of, in Ejectment—"Value of Tenements" in County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 11—*Prohibition.*

6 C.B. 417, 420.
7 C.B. 308
7 Ex. 414, 422

By the County Courts Act, 1867, s. 11, all actions of ejectment, where "neither the value of the tenements, nor the rent payable in respect thereof, shall exceed 20*l.* by the year," may be brought in the county court of the district in which the tenements are situate.

A lessee for years with a rent reserved, brought ejectment in a county court; the annual value of the premises to let to an occupying tenant was more than 20*l.*, but the value of the plaintiff's interest, after deducting the rent he paid, was less than 20*l.* The county court judge having decided that he had jurisdiction:—

Held, that "the value of the tenements" means the actual marketable value, and of this the rent at which the tenements would let was a fair criterion. Secondly, that the judge having assumed jurisdiction, not by deciding on conflicting facts, but on a wrong assumption as to a point of law, the Court could review his decision by prohibition.

RULE calling upon the Judge of the County Court of Yorkshire, holden at Sheffield, and the plaintiff, to shew cause why a writ of prohibition should not issue to restrain further proceedings in the plaint.

It appeared from the affidavits, that the plaint was brought under the County Courts Act, 1867 (30 & 31 Vict. c. 142), s. 11 (1), to recover possession of certain tenements, claimed by the plaintiff as assignee of a lease for ninety-nine years, at a ground rent of 9*l.* 17*s.* The original lessee had mortgaged the term to the trustees of the Atlas Benefit Building Society, who upon his bankruptcy sold the property to the plaintiff under a power of sale in the mortgage deed. The defendant claimed under an agreement for an assignment of the lease alleged to have been entered into by the original lessee after the mortgage and before the bankruptcy.

At the hearing objection was taken by the defendant to the jurisdiction, on the ground that the value of the tenements exceeded 20*l.* Conflicting evidence was given upon that point, and

(1) 30 & 31 Vict. c. 142, s. 11:—"All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements, or hereditaments are situate."

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it was contended by the plaintiff that although the letting value of the tenements might exceed 20*l.*, the sum of 9*l.* 17*s.* payable as ground rent ought to be deducted, and that if that deduction was made, the value would be brought below 20*l.* The judge came to the conclusion that he had jurisdiction. He was further of opinion that the plaintiff had proved his title, and judgment was given accordingly.

When the matter was before a judge at chambers, the county court judge was requested to furnish a copy of his notes; he refused to do so, or to give any information as to the grounds of his judgment. A copy of the shorthand writer's notes of the judgment, which it was agreed by both parties were substantially correct, was produced on the argument; and from them it appeared that the judge had come to the conclusion upon the evidence that the letting value of the tenements exceeded 20*l.*, but that upon the proper construction of s. 11 of the County Courts Act, 1867, he ought to consider the value of the lessee's interest merely, and that that was below 20*l.*, and therefore that he had jurisdiction.

Oppenheim shewed cause. The judge's decision was right. The value contemplated by the statute is the value to the plaintiff. In *Brown* v. *Cocking* (1) Cockburn, C.J., says: "The value or rent must be the value or rent between the litigant parties."

[BLACKBURN, J. The statute speaks of the value of the lands, tenements, or hereditaments, not the value of the litigant's interest in them.

LUSH, J. If the defendant's contention is right, the value of the lands would vary according as the superior landlord, the lessee, or the sublessee, were bringing the action.

COCKBURN, C.J. Must not the legislature have contemplated the actual marketable value? The parliamentary exposition of value for rating purposes is not very remote from the present question.]

No doubt in the Parochial Assessment Act the value is the letting value from year to year: but subject to deductions; and in like manner the ground rent here should be deducted. Secondly, whether the judge was right or wrong in making the deduction,

(1) Law Rep. 3 Q. B. at p. 675.

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the evidence given upon the question of value was conflicting, and the Court will not allow the writ to issue where the judge has decided upon a disputed question of fact: *Joseph* v. *Henry* (1); *Lexden Union* v. *Southgate.* (2)

[COCKBURN, C.J. It is not disputed that the point upon which the judge decided was that he was bound by law to deduct the ground rent paid to the superior landlord, and that when that deduction was made, and then only, the value was less than 20*l.*]

Ryalls, in support of the rule, was not heard.

COCKBURN, C.J. I am of opinion that this rule should be made absolute. There are two points in the case. The first involves the question whether, in calculating the value of premises, in respect of which an action of ejectment has been brought, for the purpose of ascertaining whether the county court has jurisdiction under section 11 of the County Courts Act, 1867, the amount payable as ground rent to the superior landlord is to be deducted from the sum which would be paid as rent by the tenant to his immediate lessor. The second point made is, that a writ of prohibition ought not to issue, on the ground that the evidence of value was conflicting, and that the judge has decided that he had jurisdiction upon a disputed question of fact.

On the first of these points, I think it is clear that the judge came to the conclusion that the value of the premises was, by deduction of the amount payable as ground rent, just brought within the limit as to which jurisdiction is given by the County Courts Act, 1867, s. 11. It is true that that statute has left the meaning of the term "value" uncertain; and it is also true that the value to the landlord may differ from the value to the tenant; it may pay the tenant to give a rent of 200*l.* a year, and that may be the value to him, while in the hands of the landlord, who may have to pay a ground rent of 20*l.* a year, the value is reduced, and is 200*l.* minus 20*l.* That being so, what is the criterion of value within the meaning of s. 11? The legislature, in a case somewhat analogous to this, that of the assessment of lands to the poor-rate (3), has given a parliamentary exposition of value, and has

(1) 1 L. M. & P. 388; 19 L. J. (Q.B.) 369.

(2) 10 Ex. 201; 23 L. J. (Ex.) 316.

(3) The Parochial Assessment Act, 6 & 7 Wm. 4, c. 96, s. 1.

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said that the value of land is the rent which a tenant from year to year might be expected to pay; arguing from that analogy, I think that this question must be decided by our holding that the actual marketable value is the value which was contemplated by the legislature, and that the rent which would be paid by the tenant in occupation is the best criterion of that value. The judge was, therefore, wrong in deducting the amount payable as ground rent.

On the second point, I think that the case is one in which the writ ought to go. If there has been a real conflict of testimony upon some fact which goes to the question of jurisdiction, the Court will not interfere, except upon very strong grounds. The judge has then really exercised his discretion; but when he has given himself jurisdiction by coming to an erroneous conclusion upon a point of law, the case is very different, and he is in fact without jurisdiction, and has no authority to entertain the question. It is apparent that that was the case here, and I think, therefore, that the writ of prohibition ought to issue.

BLACKBURN, J. I am of the same opinion. I entirely agree with the case of *Brown* v. *Cocking* (1); but it does not appear to me to touch the first point. What was there decided was that the "rent payable" means the rent payable as between the litigant parties, and the fact that some third person was paying a higher rent was not a conclusive test of value, though it would be strong evidence of it. Then, is the fact that the lessor pays ground rent to be taken into consideration? Doubtless it affects the value of his interest in the land; but according to the statute the value of the lands, and not of the interest of any one in the lands, is the subject matter by which the jurisdiction of the county court is governed, and of that value, I think that the rent which the land would command is a fair test.

On the second point I would refer to *Thompson* v. *Ingham* (2), where to a declaration in prohibition against a county court judge, which stated that title to land was in question, there was a plea alleging that the judge heard the evidence of both parties upon the point, and adjudged that title was not in question. The plea was demurred to, and judgment was given for the plaintiff; the

(1) Law Rep. 3 Q. B. 672. (2) 14 Q. B. 710; 19 L. J. (Q.B.) 189.

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ground of the decision being, that although the judge must of necessity decide the point for the time, his determination was not conclusive, as in the analogous case of a plea to the jurisdiction; and as there was no writ of error from the county court, the question whether there was jurisdiction or not must be open to one of the superior courts on motion for a prohibition. If the value of the land was above 20*l.*, there would be good ground for issuing the writ; and I am quite prepared to hold that if the evidence upon that point was conflicting, that circumstance, though not conclusive upon us, so as absolutely to deprive us of the discretionary power of granting the prohibition, would so far influence us, that we should require very strong grounds before we should interfere. It is clear, in the present case, that what the judge found was simply that, taking his view of the law and deducting the ground rent, the value of the land was below 20*l.* I think that he was wrong in the conclusion at which he arrived, because he applied a wrong rule of law to the facts, and therefore that he had no jurisdiction.

LUSH, J. I am of the same opinion; and I only wish to add that I think we are following the ordinary rules of construction, and giving their fair and ordinary meaning to the words of the statute. In s. 11, and that which immediately follows, the same words are used, "the value of the lands." Mr. Oppenheim's argument would compel us to substitute for those words, "the value of the interest in the lands."

HANNEN, J., concurred.

Rule absolute.

Attorneys for plaintiff: *Doyle & Edwards, for J. & G. E. Webster, Sheffield.*

Attorney for defendant: *Hickin.*

GRANT, APPELLANT; THE LOCAL BOARD FOR THE DISTRICT OF OXFORD, RESPONDENTS.

1868
Nov. 14.

Poor-rate—Occupation—Floating Barge, Rateability of.

The corporation of Oxford are the owners of the soil of the bed of the river Isis, which is subject to the control of the conservators of the river Thames, and is a public highway. The University Boat Club are possessed of a barge which is moored to two posts fixed to the soil, by means of two iron rings which are attached to the barge, and pass loosely round the posts so as to allow the barge to rise and fall with the water of the river; and sometimes, when the water is very low, the barge rests on the soil; the barge, though capable of being moved, is never in fact moved from its station. The posts were driven into the soil more than twenty years ago, and have since been so used by the boat club, but without the licence of the corporation or of any one else. There was no evidence by whom or by whose authority the posts had been first placed, and no rent had ever been paid by any one for their use. The University Boat Club having been assessed to general district rates in respect of these posts and the barge attached:—

Held, that, on these facts there was no proof of occupation, as of right, of the posts by the University Boat Club, and therefore that they were not rateable.

CASE stated, on appeal against two district rates, under 12 & 13 Vict. c. 45, s. 11.

1. The appellant is the secretary to the Oxford University Boat Club, and is for the purpose of this case to be taken as the person liable in respect of the subject of the rates, if the club or any member of it is in the opinion of the Court liable to be so rated. The respondents are the Oxford Local Board, duly empowered to make such rates.

2. The two rates were two general district rates at 1*s.* 6*d.* and 8*d.* in the pound respectively, made by the respondents under the provisions of the Local Government Supplemental Act, 1865, and of the act incorporated therewith, to which rates the club was assessed as follows:—

No. of Assessment.	Name of Occupier.	Name of Owner.	Description of Property Rated.	Name or Situation of the Property.
12	The University Boat Club.	The University Boat Club.	Posts fixed in the soil under the river, and land occupied by the said posts, and by landing stage platform, floating barge or house boat, and other things connected therewith, and with the said soil.	On the river Isis, adjoining Christchurch meadow.

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3. The bed of the river Isis, of which the mayor and corporation of the city of Oxford are seised in fee, forms part of the district of the Oxford Local Board.

4. The river is a navigable river subject to the control of the conservators of the river Thames, and is a public and common highway over which all the subjects of the Queen have always of right had free passage, navigation, and anchorage, for boats, barges, and other vessels.

5. The freemen of the city of Oxford have of right enjoyed the sole and exclusive right of fishing in the river so far as it flows over the bed of the river within the district of the local board, and of using for that purpose boats, barges, and other vessels.

6. The Oxford University Boat Club is composed of members of the University of Oxford, and is possessed of a barge or house boat which floats on the river, and is moored at a distance of about thirty feet from the bank of the river by means of two iron rings, which are fixed to the barge and pass loosely and moveably round two solid fixed posts. The posts are driven into the bed of the river, and are of such a diameter as to allow the rings to pass freely up and down, and thus to allow the barge to rise and fall with the water of the river. In some very dry seasons, and when the water is low, though the bed of the river remains covered with water, yet the barge rests on the bed of the river occasionally for a short time. The barge, though capable of being moved, is never in fact moved from its station.

7. Between the barge and the bank of the river are four other posts driven into the bed of the river, two of which posts are at a short distance from the barge, and the other two are at a short distance from the bank, and the club is also possessed of a moveable frame of boards joined together, which is laid down on the top of the four posts, but is not fixed to the posts nor to the barge or bank, neither does the wooden frame touch the bank or the barge, but it forms with the posts the gangway from the barge to the bank, from which the approach is to the barge. The bank is the property of the Dean and Chapter of Christ Church.

8. All the posts were so driven into the bed of the river more than twenty years before the making of the rates, for the purpose

of being used as aforesaid, and have remained so driven in and been so used, but without the leave or licence of the mayor and corporation of the city of Oxford or of any other body corporate or person whomsoever, and no payment of rent or other acknowledgment has ever been made by the club or any member, either to the mayor and corporation of the city of Oxford or to any other person.

9. The club is also possessed of several boats, which the members of the club use on the river, and beside the facts hereinafter stated, the barge is used to enable the members of the club to get conveniently into and out of their boats, and the members of the club are in the habit of stepping from the bank on to the wooden frame and walking along it and then stepping off the wooden frame on to their barge as one way of access to the barge, there being no other way of access from either bank of the river to the barge except by boat, but the members of the club have no legal right, title, or interest in the soil of the bank, or to pass or repass over the same.

10. The barge was built, and is maintained by, the subscriptions of the members of the club; it is roofed over and forms one room, with small partitions at one end for use as dressing-rooms; the rooms are lighted by windows in the side of the barge above the water line. No person ever sleeps or resides in the barge, but the same is used in the daytime only by the members, for the time being of the club, as a way of getting into and out of their boats, and for the purpose of putting on and taking off their boating-dresses, and for reading and other amusement at the free will and pleasure of the members of the club respectively. The barge is regularly supplied with daily and other newspapers and reviews, and produces no pecuniary profit or benefit whatever to the club or to any member thereof.

11. No house, building, land, tenement, or hereditament, is, or ever has been occupied, held, or used, in connection or conjunction with the barge, unless the posts driven into the bed of the river can be considered such.

12. The club is not, nor is any member thereof, the owner or occupier of any such post, or land, or landing stage, platform, floating barge, house boat, or other things connected therewith or

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with the soil under the river, as in the rates are mentioned, or of any rateable property whatsoever, unless and so far only as the facts hereinbefore stated may, in the opinion of the Court, make them such owner or occupier of the whole or any part thereof, and liable to be rated in respect of such ownership or occupation.

13. No such barge, landing stage, platform, post, or other thing connected therewith as mentioned in the rates, have, or has at any time been assessed to rates for the relief of the poor, nor has any part of the property in this case above mentioned been at any time taxed, rated, or assessed in any manner or for any purpose whatsoever.

The appellant contends—1. That the property rated is not liable to be rated or assessed. 2. That the club is not the owner or occupier of the land or soil, or of anything connected therewith. 3. That there is not, and cannot be, any such occupation or right to occupy the posts, landing stage, platform, floating barge, house boat, and other things connected therewith, or any part thereof so standing and being in and upon the highway, as to render the same rateable property or the club liable to be rated in respect thereof.

The question for the opinion of the Court is, whether the club, or any member thereof, is liable upon the above statement to be rated for the whole or any, and if any, what portion of the property described in the rates.

Nov. 11. *Maule, Q.C.* (*H. R. Clarke* and *Davenport* with him), for the appellant, contended that the University Boat Club had no property in the soil of the bed of the river or in the post, and that the mere fact of attaching their boat to the post did not make them rateable: *Williams* v. *Jones* (1); *Watkins* v. *Overseers of Milton-next-Gravesend.* (2)

Nov. 14. *Mellish, Q.C.* (*J. O. Griffits* with him), for the respondents, contended that the boat club having used the post for twenty years could not take advantage of their own wrong, and say they were trespassers and not occupiers, and that to hold that

(1) 12 East, 346. (2) Law Rep. 3 Q. B. 350.

they were not rateable, would be inconsistent with all the authorities: *Reg.* v. *Leith* (1); *Reg.* v. *Forest* (2); *Electric Telegraph Company* v. *Overseers of Salford* (3); *Reg.* v. *Morrison.* (4)

COCKBURN, C.J. I think our judgment should be for the appellant, and I rest my opinion upon extremely narrow grounds. It does not appear to me to be necessary to consider the decisions upon this subject; as I do not think any of the cases are in point, because all the decisions in which matters like the present have been held to be rateable rest upon occupation. A rate can only be made on an occupier. It is not necessary in the present case to decide whether a person occupying a post or any other form of permanent landing place in a river, and attaching barges thereto, and allowing other persons for profit to attach barges thereto, is or is not rateable. It appears to me in this case the proof of occupation altogether fails; and it is, therefore, unnecessary to consider whether, if it had been established that the boat club were occupiers, it would follow that this particular description of landing place and means of access from the shore to the barge, and the barge with it, were rateable or not; it is unnecessary to decide that. It seems to me that there is nothing to shew that the posts are not at the present moment in the occupation of the owners of the soil. The posts have been permanently fixed in the soil; how they came to be fixed, by whom or by what authority, does not appear; whether it was by permission of the owners of the soil or not, we do not know, or whether it was a mere act of encroachment and trespass. But there is nothing to satisfy me that the University Boat Club have the exclusive enjoyment of these posts in them. I see nothing which at all satisfies me that if any other person, navigating that part of the river, were minded to treat these posts as a mere mooring place in the bed of the river for the general convenience and accommodation of the public, and came and attached other barges or vessels to one of these posts, or did any other act which might interfere with

(1) 1 E. & B. 121; 21 L. J. (M.C.) 119.

(2) 8 E. & B. 890; 27 L. J. (M.C.) 96.

(3) 11 Ex. 181; 24 L. J. (M.C.) 146.

(4) 1 E. & B. 150; 22 L. J. (M.C.) 14.

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the assumed enjoyment or occupation of these posts on the part of the boat club, the boat club would have a remedy by action of trespass or otherwise against the persons so interfering with this assumed right on their part. There does not seem to be any exclusive occupation in the club, and inasmuch as exclusive occupation must necessarily be the foundation of their rateability, it seems to me it would be wrong in this case to say that this property in their hands is capable of being rated.

HANNEN, J. I am of the same opinion. The substance of the thing is this, that the University Boat Club occupy a floating boat, the particular place where it is is a mere accident, and has nothing to do with the substantial enjoyment which they have of that boat; it is simply because it is not worth any one's while to require them to move away from that place, that they have continued in the same place for a good number of years. Then it is said that they occupied the posts, and in that sense it is argued that the attachment of the boat to the posts is ancillary to the enjoyment and occupation of the posts. It is obvious that nothing can be more artificial than such reasoning, and I do not think it is sound, because I think that the use made of these posts is not changed from the first hour when the boat was tied to it, in whatever way it may have been, whether by rope or by a chain; the thing became more permanent from nobody thinking it necessary to require the boat to be removed away from its place. By fixing rings round them the character of the use of the posts seems to me to remain just the same as it was at first; it is simply a means by which a floating boat is attached to a projection from the soil of the river. It seems to me on the facts stated no exclusive right to these posts has been obtained, and that anybody else may come and tie their boats to the posts in the same way as this University boat is attached to them. For these reasons I think that our judgment must be for the appellant.

HAYES, J. I entirely agree in the plain, clear, and concise view which has been taken by my Lord and my Brother Hannen, that judgment must be given for the appellant. I think the cases have gone quite far enough in deciding that things which are

substantially chattels are rateable as real property. This boat is a chattel, and it would certainly be a strong thing to say that it could be rated as real property, such as a tenement or an hereditament, unless there is a clear case of occupation, an occupation of something which is firmly and permanently affixed or attached to the soil itself; therefore it seems to me there is no ground for this rating.

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Judgment for the appellant.

Attorneys for appellant: *Davies, Son, Campbell, & Reeves.*
Attorney for respondents: *Philpot.*

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF GREENWICH, RESPONDENTS; *v.* THE METROPOLITAN BOARD OF WORKS, APPELLANTS.

Nov. 25.

Poor-rate—Beneficial Occupation—Sewers, Wharf, Engine-house, Pumping Station, Rateability of.

The Metropolitan Board of Works were empowered by 21 & 22 Vict. c. 104, and other statutes, to make the necessary sewers and works for the improvement of the main drainage of the metropolis. The sewers, except at the pumping stations, passed under the public highways of the metropolis, or under land on which the board had no property. The pumping stations were erected upon land the property of the board, but were used solely as part of the main drainage scheme. The board were also in occupation of a wharf, lay-by for barges, tramways, engine houses, coal sheds, and dwelling house, all of which were occupied for the purposes of the main drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, but the whole were maintained out of funds raised by a rate made in pursuance of the statutes:—

Held, that the sewers were not rateable to the poor-rate, on the ground that they were not the subject of a beneficial occupation; but that the rest of the property had an occupation value, and the board were rateable in respect of them, as there was nothing in the statutes exempting them from rateability.

ON appeal to the quarter sessions of the western division of Kent against a poor-rate and a general rate made by the overseers of the parish of Greenwich, in accordance with a valuation list made by the vestry of that parish, the sessions confirmed the rate, subject to the opinion of the Court upon the following case:—

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The following is an extract from the rate :—

No of Assessment.	Name of Occupier.	Name of Owner.	Description of Property.	Gross Estimated Rental.	Rateable Value.
				£ s.	£
876	Metropolitan Board of Works.	Metropolitan Board of Works.	Wharf and Engine House in Norman Road	35 0	30
878	Do.	Do.	Pumping Station, Land Wharf, Lay-by for barges, Tramways, Two Engine-houses, Four Steam Engines, Boiler-house, Chimney Stack, Two Filth Hoists, Coal Sheds, and Dwelling-house in North Pole Lane	7,146 0	3,768
879	Do.	Do.	Land occupied by Southern High Level Sewer	315 0	218
880	Do.	Do.	Land occupied by Southern Low Level Sewer	203 0	140
881	Do.	Do.	Land occupied by the Southern Outfall Sewer	1,822 10	1,258

1. The appellants are the Metropolitan Board of Works, constituted and incorporated by 18 & 19 Vict. c. 120 (amended by 19 & 20 Vict. c. 112, 21 & 22 Vict. c. 104, and 25 & 26 Vict. c. 102, 26 & 27 Vict. c. 68, and 28 Vict. c. 19), for the local management of the metropolis in respect of the sewerage and drainage, and the paving, cleaning, lighting, and improvements thereof.

2. The respondents are the churchwardens and overseers of the parish of Greenwich, and under 9 Geo. 4, c. xliii., have power to levy certain rates for the relief of the poor, and for general purposes within the parish. (1)

3. By s. 135 of 18 & 19 Vict. c. 120, it was enacted that the main sewers then vested in the Commissioners of Sewers of the city of London, and in the Metropolitan Commissioners of Sewers respectively, with the walls, defences, banks, outlets, sluices, flaps, pen-

Part 23.

(1) 9 Geo. 4, c. xliii. s. 20 :—"Once in every year, or oftener, it shall be lawful for the churchwardens, overseers, and parishioners assembled at a vestry meeting, to make rates upon all persons who shall occupy, hold, or use any houses, buildings, lands, tenements, or hereditaments, or possess any rateable property within the said parish; that is to say, one rate for defraying the expenses of maintaining and employing the poor of the said parish, and all other expenses relating thereto; and one other rate . . . for the maintaining of the highways," &c.

stocks, gullies, grates, works, and things thereunto belonging, and the materials thereof, with all rights of way and passage used and enjoyed by such commissioners respectively over and to such sewers, works, and things, and all rights concerning or incident to such sewers, works, and things should be vested in the Metropolitan Board of Works, and such board should make such sewers and works as they might think necessary for preventing all or any part of the sewage within the metropolis from flowing or passing into the river Thames in or near the metropolis, and should cause such sewers and works to be completed on or before the 31st of December, 1860, and should also make such other sewers and works, and such diversions or alterations of any existing sewers or works vested in them under that act as they might from time to time think necessary for the effectual sewerage and drainage of the metropolis, and should discontinue, close up, or destroy such sewers for the time being vested in them under this act as they might deem unnecessary, and such board should from time to time repair and maintain the sewers so vested in them, or such of them as might not be discontinued, closed up, or destroyed; and the section further enacts that the board should cause the sewers vested in them to be constructed, covered, and kept so as not to be a nuisance, or injurious to health, and to be properly cleared, cleansed, and emptied, and for the purpose of cleaning and emptying the same, they might construct and place either above or under ground such reservoirs, sluices, engines, and other works as might be necessary, and might cause the sewage and refuse from such sewers to be sold and disposed of as they might see fit, but so as not to create a nuisance, and the money arising thereby should be applied towards defraying the expenses of such board.

4. By 21 & 22 Vict. c. 104, s. 1, it was enacted that the Metropolitan Board of Works should cause to be commenced as soon as might be after the passing of that act, and to be carried on and completed with all convenient speed according to such plan as to them might seem proper, the necessary sewers and works for the improvement of the main drainage of the metropolis, and for preventing, as far as might be practicable, the sewage of the metropolis from passing into the river Thames within the metropolis; and by the same act power was given to the Metropolitan Board

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to raise a sum of money not exceeding 3,000,000*l.* (s. 4), to be guaranteed by the Treasury (s. 6), and applied only in payment of the expenses of the works executed under this act (s. 8); and the Metropolitan Board of Works was directed for the purposes of that act during forty years from the passing of that act to levy a rate of 3*d.* in the pound on the annual value of the whole of the property in the metropolis (s. 10), to be called the Metropolitan Main Drainage Rate (s. 11); and by s. 12 it was declared that for the purpose of the assessments under that act all the parts of the metropolis should be deemed to be equally benefited by the expenditure under that act.

5. By s. 18, it was enacted that an account should be opened in the books of the governor and company of the Bank of England for the purposes of that act in the names of such officers or persons as the Commissioners of her Majesty's Treasury might direct, and such account should be deemed a public account, and all moneys payable under the precepts of the Metropolitan Board of Works in respect of the Metropolis Main Drainage Rate, should be paid into the Bank of England to such account, and the dividend and income arising from the investments of any such moneys under that act, and the produce of the sale from time to time of such investments, and all moneys borrowed for repayment until applied for that purpose should be paid into the Bank of England to the account.

6. By s. 19, it was enacted that all moneys paid to the credit of the account should be, from time to time, applied in payment of the interest of the moneys borrowed under that act, and subject thereto, in or towards payment of any moneys so borrowed, which, for the time being might be payable, or the purchase of bonds, debentures, or securities, whereby any such moneys were secured for the purpose of the extinction thereof, and any surplus after answering the purposes aforesaid should be invested in government securities in such manner as the Commissioners of the Treasury might think fit and direct, and such investment should be sold when and as the Commissioners of the Treasury might direct. And by s. 22, it was enacted that if the amount raisable under that act should have been raised and paid off by means of the rates levied under the act before the expiration of the period of

forty years, the Metropolitan Board of Works, with the consent of the Commissioners of her Majesty's Treasury, should discontinue the assessment for the Metropolis Main Drainage Rate, and any surplus of the moneys arising from the rates levied under that act which might remain after such payment should be applicable towards defraying the expenses of such board.

7. By 26 & 27 Vict. c. 68, the Metropolitan Board of Works was empowered to borrow with the consent and in the manner provided, and subject to the conditions contained in the last-mentioned act, any sum of money, not exceeding in the whole, 1,200,000*l.*, in addition to the sum by that act authorized to be borrowed, and by 28 Vict. c. 19, the time for borrowing was extended to the 31st of December, 1867.

8. The Metropolitan Board of Works, in pursuance of the directions and under the powers given to and conferred on them as aforesaid, commenced the construction of a system of sewers to intercept the drainage of the metropolis, connected with pumping stations by means of which the sewage is lifted from a lower to a higher level, and ultimately discharged at a point many miles down the Thames and without the metropolis.

9. The sewers (except at the pumping stations) pass under the public highways of the metropolis, or under land in which the Metropolitan Board of Works have (except as herein appears) no property whatever. The pumping stations are erected upon land, the property of the Metropolitan Board of Works, but are used solely as part of the metropolitan main drainage and intercepting scheme.

10. The whole of the works both on the northern and southern sides of the river Thames are designed and intended to carry out the purposes specified and set forth in the Metropolitan Management Acts, 1855, 1858, and 1862, the main objects being the improvement of the main drainage of the metropolis and the purification of the Thames by the interception of the sewage, so as to prevent it, as far as may be practicable, from flowing into and polluting the river within the metropolis, and the discharge of the same, as in the last paragraph mentioned. All the sewers discharge themselves, by the works constructed under the above acts, on the north side of the river at a point without the limits of the

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metropolis, and on the south side of the river at a point about one mile beyond the limits of the metropolis, as defined by the first-mentioned act.

11. The assessments hereinbefore set forth are made in respect of a pumping station and certain lengths of sewers forming part of the metropolitan main drainage and intercepting scheme, and situate on the south side of the river Thames, and within the parish of Greenwich.

12. The property comprised in assessment No. 876 is held by the Metropolitan Board of Works under a lease of which seven years remain unexpired. The wharf and engine house were erected for a temporary purpose as part of the metropolitan main drainage and intercepting scheme, and were in the occupation of the board before and at the time of the making the rate, but are no longer used by the Board of Works for any purpose whatever. The land included in this assessment was rated before the board took possession of it.

13. The property comprised in assessment No. 878 is the freehold property of the Metropolitan Board of Works, and consists of 3*a.* 3*r.* 20*p.* of land, which was purchased by them for 9730*l.*, and on which have been erected engine houses and other buildings and works, part of the pumping station described in the rate, and used solely for the purposes of the main drainage and intercepting scheme. There is also a dwelling house which consists of six rooms, in which the manager of the pumping station is compelled to live under his agreement with the board, and for which he pays no rent, and which, if rateable at all, is only of the rateable value of 20*l.* A portion of the land is laid out as a garden. There are also coal sheds, store rooms, workshops, tramways, turntables, cranes, wharf, and lay-by for barges. The pumping station, with the machinery, engines, works, &c., cost about 94,000*l.* The land included in this assessment was rated before the board took possession of it.

14. The property comprised in assessment No. 879 is part of the southern high level sewer, 990 feet in length, in the parish of Greenwich, and which for 725 feet runs under land which is not the property of the Metropolitan Board of Works, and for the remaining 265 feet under land which is comprised in assessment

No. 878. The total length of this sewer is 5¼ miles. It commenced at Clapham, and runs through Clapham, Southwark, Brixton, Camberwell, Peckham, Hatcham, and Deptford, and terminates at the pumping station at Greenwich, and it drains an area of twenty square miles, including Tooting, Streatham, Brixton, Dulwich, Camberwell, Peckham, Norwood, and Sydenham. This sewer is constructed of sufficient capacity to carry off all the flood waters so as entirely to intercept them from the low and thickly populated district before mentioned, which was tide-locked and subject to floods.

15. The property comprised in assessment No. 880 is part of the southern low level sewer, 230 feet in length, in the parish of Greenwich, which for forty-five feet runs under land which is not the property of the Metropolitan Board of Works, and for the remaining 185 feet, under land which is comprised in assessment No. 878. The total length of this sewer is about ten miles. It commences at High Street, Putney, and runs through Wandsworth, Battersea, Kennington, Camberwell, and Deptford, and terminates at the pumping station at Greenwich, and it drains an area of about twenty square miles, including Putney, Battersea, Nine Elms, Lambeth, Newington, Southwark, Bermondsey, Rotherhithe, and Deptford, the surface of which is mostly below the level of high water, in many places five or six feet, it having at one time been completely covered by the river Thames. In this district the old sewers had but little fall, and, except at the period of low water, were tide-locked and stagnant. After long-continued rain they became overcharged, and were unable to empty themselves during the short period of low water; the waters were therefore constantly accumulating, and many days frequently elapsed after the cessation of rain before the old sewers could be entirely relieved, the sewage in the interim being forced into the basements and cellars of the houses. The defects contributed to render the district most unhealthy; but the construction of the low level sewer has rendered the district as dry and free from disease as any portion of the metropolis.

16. The property comprised in assessment No. 881 is part of the southern outfall sewer, 11,072 feet in length, in the parish of Greenwich, and runs under land which is not the property of the

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Metropolitan Board of Works. This sewer is about $7\frac{3}{4}$ miles in length. It commences at the pumping station at Greenwich, where it receives the sewage brought there by the high and low level sewers, and terminates at the river Thames at Erith. The sewage from the low level sewer has to be pumped up from such sewer from a depth of eighteen feet, such sewer being about that depth below the level of the bottom of the outfall sewer. The whole of the sewage of the south side of the Thames passes through the pumping station into this outfall sewer.

17. The whole of the property comprised in the assessments is held, occupied, and used by the board in the manner and for the purposes herein set forth, and not otherwise.

18. The late commissioners of sewers never were rated to the relief of the poor in respect of the sewers or works connected therewith, and the Metropolitan Board of Works have never hitherto been rated in respect of the sewers, but they have been rated in the parish of Greenwich for a wharf, engine house, and pumping station connected with the sewers.

19. The appellants have not derived, nor do they derive, any profit or advantage from the drainage and intercepting works, except as herein stated; but the whole are maintained out of the funds raised in pursuance of the acts hereinbefore mentioned, and carried on for the purposes in the acts specified and set forth.

20. By 28 Vict. c. cxxi., which was passed on the 19th of June, 1865, and which is to be taken as forming part of this case, power was given to a company under and subject to the provisions of the act to utilize the sewage collected in the main outfall sewers on the northern side of the Thames, and the benefit of a certain agreement, a copy of which is set out in the schedule of the act, and all the obligations and engagements undertaken were transferred to the company (s. 115); and it was provided, that after certain payments therein specified had been made, the Metropolitan Board of Works should receive a certain share of the net profits of the company, but no money was to be received from the company until the expiration of four years from the passing of the act; and any money thereafter to be received by the board was to be applied generally in aid of the rates of the metropolis. The works authorized by the act are unfinished. There are only about two miles out of

about thirty-six complete, and no profit has hitherto been made by the utilization of the sewage by any one, and no money has been received from the company by the Metropolitan Board of Works.

21. The sum of 3,000,000*l.* (the repayment of which has been duly guaranteed by the Treasury) is now due and owing by the appellants for principal moneys borrowed under the acts, and expended on the metropolitan main drainage and intercepting scheme; and no works of the character set forth above have been done, except with the money borrowed under the acts.

22. The respondents contend that the property of the appellants is liable to be rated for the relief of the poor of the parish of Greenwich, and for general purposes within the parish, under s. 20 (1) of 9 Geo. 4, c. xliii.

23. The appellants contend that they do not hold, occupy, or use the houses, buildings, lands, tenements, and hereditaments hereinbefore referred to, so as to be liable to be rated to the relief of the poor under 9 Geo. 4, c. xliii.; and that they do not possess any rateable property within the parish of Greenwich.

25. The Court is to have power to draw any inferences of fact, if they think fit so to do, and to amend the rate.

The question for the Court is, whether the Metropolitan Board of Works are rateable to the relief of the poor and to the general rate of the parish of Greenwich in respect of the premises specified in the assessments, or in any of them.

Nov. 11. *Keane, Q.C., Barrow,* and *Poland,* for the respondents, shewed cause against the rule to quash the order of sessions. There is no statute exempting the defendants from rateability, the case therefore falls within the law as laid down in *Jones* v. *Mersey Docks* (2), that wherever there is an actual occupation of land, the land is rateable. The defendants primâ facie occupy the sewer, and the occupation is valuable in the sense that it conveys away the sewage from the houses that drain into it. The appellants represent the occupiers of these houses, the enjoyment of which is rendered more beneficial by the sewage being carried off. They are therefore rateable. In *Reg.* v. *Wallingford* (3), the Court,

(1) See note, ante p. 16. (2) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur. N. S. 46

(3) 10 Ad. & E. 259.

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following *Governors of Bristol Poor* v. *Wait* (1), held that the guardians of the poor were rateable for a workhouse situate in one of many parishes which had been formed into a union, although the guardians were trustees for a public purpose, and the moneys in their hands were to be applied to public purposes. It may be said, on the authority of *Rex* v. *Sculcoates* (2), where it was sought to rate a drain, that in the present case there is no beneficial occupation; that case, however, must be considered overruled by *Jones* v. *Mersey Docks.* (3) It is impossible to distinguish the cases; there the dock trustees were in occupation of the docks for public purposes, and though the whole of the revenue was applied to such purposes, they were held liable to be rated; here the ratepayers contribute a revenue, which is received by a public body for public purposes, and they ought to be rated. In *Reg.* v. *Cooper* (4), the Local Board of Health of Hull, who by the Public Health Act (11 & 12 Vict. c. 63) were constituted the surveyors of highways, rented and occupied a yard as a place of deposit for stones; they were held rateable, although they derived no actual profit from the occupation; and Crompton, J., during the argument, intimated that the payment of the rate would be included in "the expenses" which were to be provided for by s. 87. The fact that property is wholly dedicated to a public purpose is no ground of exemption from rateability: *Greig* v. *University of Edinburgh.* (5) At all events, the pumping engine and the other property are liable to be rated; the land on which they are would, under ordinary circumstances, contribute to the maintenance of the poor, and it does not cease to have a value because these buildings are erected on them.

Mellish, Q.C., *Raymond*, and *Biron*, for the appellants, in support of the rule. First, with regard to the sewers, the Commissioners of Sewers, whom the Metropolitan Board of Works represent, have existed from the time of Henry VIII., and have never been rated to the relief of the poor. They hold the property for the public, from which no benefit can be derived. They are empowered under a public act to levy a rate of 3*d.* in the pound for the main-

(1) 5 Ad. & E. 1.
(2) 12 East, 40.
(3) 11 H. L. C. 443; 35 L. J. (M.C.) 1.
(4) 23 L. J. (M.C.) 183.
(5) Law Rep. 1 H. L., Sc., 348.

tenance of the sewers and for the repayment of the money they have borrowed to construct them; but a general taxation of the public is not a profit which is liable to be rated. Occupation of property by itself does not make it rateable, the occupation must be beneficial. If a person cannot at law derive any profit from the land in his occupation, he is not rateable: *Mayor of Lincoln* v. *Holmes Common*. (1) *Jones* v. *Mersey Docks* (2), has no application to this case. In that case a profit was received by reason of the use of the premises; the tax in the present case is received under a statute, and if the sewers ceased to exist, still the tax would be levied, but if the docks were destroyed the bondholders who had advanced their money on the security of the tolls would lose it, and the rate would cease. This is like the case of a county bridge, which is in possession of the county justices; it is beneficial to the whole county, but no one ever heard that it was liable to be rated to the poor. In *Reg.* v. *Wallingford* (3), the ground of the decision is that the property "being beneficially occupied" is subject to the poor-rate; so in *Reg.* v. *Cooper* (4) the Local Board of Health occupied the yard as trustees, and used it to deposit materials for the repair of highways; it need not have been appropriated to that purpose any more than any other purpose. In the present case the sewer cannot be used for any other purpose than to convey away the sewage, and that without profit. In *Greig* v. *University of Edinburgh* (5), Lord Westbury says: "There may be another ground of non-liability, namely, where the property has no rateable value. . . . For it may possibly be that if property is occupied by persons for a purpose yielding no value at all, and they are absolutely prohibited from using it in any manner that would be productive of value, it may, I say, possibly be held that there is no rateable value in that property; and that in that sense, therefore, it ought not to be assessed to the poor-rate." That is precisely this case. With regard to the pumping engine, it can be applied only to pumping sewage from one level to the other; it is ancillary to the working of the sewers, and is part of the apparatus for conveying away the sewage, and is therefore not rateable. With regard to

(1) Law Rep. 2 Q. B. 482.
(2) 11 H. L. C. 443; 35 L. J. (M.C.) 14.
(3) 10 Ad. & E. 259.
(4) 23 L. J. (M.C.) 183.
(5) Law Rep. 1 H. L., Sc., at p. 354.

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the houses and the other property, they also form part of the general scheme, and the hypothetical tenant, if he took the property, would take it as a whole.

Cur. adv. vult.

Nov. 25. The judgment of the Court (Cockburn, C.J., Lush, Hannen, and Hayes, JJ.) was delivered by

LUSH, J. There is nothing in the statute, by which the defendants are constituted, or under which they constructed and now maintain the public sewers, to exempt them from rateability for any rateable property which they occupy; nothing which, either expressly or by implication, prohibits their application of the money in their hands to the payment of parochial rates, and the only question therefore is, whether the property in question is rateable.

As regards the sewers, we are of opinion that they are not rateable, on the short ground that they are not at present the subject of a beneficial occupation. No payment is made to the board for the use of them; the rates which they are empowered to levy are for the expense of construction and maintenance, and nothing more. Their occupation yields no profit to the board, as occupiers, either actual or potential.

But as regards the other property, in respect of which the board are assessed, we are of opinion that the rate is properly imposed. The wharf and engine-house in Norman Road, and the pumping station, land, wharf, lay-by for barges, tramways, engine houses, and appurtenances, in North Pole Lane, have an occupation value. The board must have rented such premises, if they had not become the owners of them, and a tenant might easily be found to take them if the board were able and willing to let them. A distinction was attempted to be drawn in favour of the pumping apparatus, as being a necessary adjunct to the sewers, and it was contended that as the sewers are not rateable, this adjunct must be exempted as being part of a non-rateable subject. But we cannot accede to this view. The machinery stands on land which is valuable for occupation, and which would, undoubtedly, be rateable in the hands of any other occupier; and its rateable quality cannot be affected by the particular use to which it is applied by the board.

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The reason why the engine and engine-pit in *Rex* v. *Bilston* (1) were held to be exempt, was that the pit was dug and the engine erected in, and that they formed parts of an ironstone mine, which was itself not a rateable subject; but that reason does not apply to the present case.

The order of sessions must therefore be confirmed as to numbers 876 and 878, and quashed as to the residue.

Rule accordingly.

Attorney for appellants: *E. W. James, Greenwich.*
Attorney for respondent: *The Solicitor to the Board.*

[IN THE EXCHEQUER CHAMBER.]

Nov. 26.

WOODHOUSE *v.* MURRAY.

Bankrupt—Defeating and delaying Creditors—Bill of Sale of Trader's Goods—Act of Bankruptcy by Trader—24 & 25 Vict. c. 134, *s.* 73.

Under s. 73 of 24 & 25 Vict. c. 134, if an execution for a debt exceeding 50*l.* be levied by seizure and sale of any of the goods of a trader, he is to be deemed to have committed an act of bankruptcy from the date of the seizure; and if within fourteen days from the date of the sale he is adjudged a bankrupt, the proceeds of the sale are to be paid to the assignees under the bankruptcy.

An execution was levied by seizure on the goods of a trader, and he, having already ceased to carry on his trade, in consideration of the judgment creditor withdrawing the execution, assigned to the creditor the goods, &c., which had been seized, being in effect the whole of his property. On these facts, the jury having found the assignment was bonâ fide, and executed to save expense, and to make the most of the property:—

Held (affirming the judgment of the Queen's Bench), that, as the creditors at large could have interfered and taken the proceeds of the execution under s. 73, there was no sufficient equivalent for the assignment to the execution creditor, which was therefore void and an act of bankruptcy.

APPEAL by the plaintiff from the decision of the Court of Queen's Bench, making absolute a rule to enter the verdict for the defendant. (2)

The following is the case stated on appeal:—

On the 1st of May, 1866, the plaintiff recovered judgment for 10,634*l.* 11*s.* 10*d.* against Patrick Proudfoot. Up to that time Proudfoot had carried on business at Manchester and elsewhere as

(1) 5 B. & C. 851. (2) Law Rep. 2 Q. B. 634.

Followed Ex parte Cooper Re Baum 10 Ch D. 313.

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a merchant and garancine manufacturer, but he ceased to carry on such business in June, 1866.

On the 10th of May, 1866, execution upon the judgment was levied upon furniture and effects at the private residence of Proudfoot, and shortly afterwards judgment was partly satisfied by sale of the said furniture and effects.

On the 5th of June, 1866, an execution upon the judgment was levied upon the stock in trade, machinery, and plant, at the manufactory of Proudfoot in Collier Street, Manchester, and also upon the manufactory itself, which was leasehold.

The sheriff's officer remained in possession of the manufactory, and the machinery, plant, and effects therein, and considerable expense was being incurred for possession money, and considerable further expense would be incurred in case the manufactory, machinery, plant, and effects, were sold by the sheriff under the execution.

Proudfoot was anxious to save this expense, and from time to time urged the plaintiff to withraw the sheriff's officer, which the plaintiff refused to do, except upon having a mortgage of the manufactory, subject to the incumbrances thereon, and a bill of sale of the effects therein executed to him by Proudfoot in order to secure the balance of the judgment debt.

The plaintiff threatening to sell under the execution on the 17th of August, 1866, Proudfoot, by a deed of that date, after reciting that Proudfoot was possessed of the said manufactory, &c., for the residue of a term of 999 years, and that the plaintiff had recovered judgment against him and execution had followed, and certain moneys had been realized thereunder, but a large balance still remained due, and that the plaintiff had entered into and retained possession of the manufactory, &c., which had occasioned considerable expense in respect of possession money, and poundage, and that the balance of the judgment debt exclusive of interest and expenses was 6546*l.* 13*s.* 1*d.*, and that the plaintiff at the request of Proudfoot had agreed to withdraw from possession on Proudfoot executing to him a mortgage of the premises for securing that sum, assigned by way of mortgage to the plaintiff the residue of the said term, except the last day, subject to incumbrances.

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On the same day Proudfoot executed to the plaintiff a bill of sale (afterwards duly registered) containing similar recitals to those in the mortgage deed, of the machinery and effects in the said manufactory enumerated in the schedule annexed, to secure payment of the said sum of 6546*l.* 18*s.* 1*d.*, with a proviso for redemption.

The sheriff's officer was thereupon withdrawn from possession.

An action brought against Proudfoot for 5072*l.* 19*s.*, was on the said 17th of August tried, and the said sum of 5072*l.* 19*s.* recovered by verdict, and judgment in such action was afterwards signed on the 31st of August, 1866.

On the 28th of August, 1866, the plaintiff entered into possession of the manufactory, machinery, and effects under the provisions of the mortgage and bill of sale.

On the 12th of September, 1866, Proudfoot was adjudged a bankrupt on a creditor's petition, the petitioning creditor being the plaintiff in the last mentioned action, and the defendant was appointed creditors' assignee.

The defendant, on the 19th of September, entered upon and took possession of the manufactory and effects; and after going out of possession for some time, again took possession, and remained in possession until and after action brought.

The said deeds comprised substantially the whole of Proudfoot's property at the date thereof.

This action was brought on the 8th of February, 1867, to establish the plaintiff's right to the manufactory and effects, and to recover damages for the trespass thereto, and was tried at the Liverpool spring assizes, 1867, before Shee, J.

One of the questions left by the learned judge to the jury was whether the deeds of the 17th of August, 1866, were executed with the honest and bonâ fide intention of preventing expense and sacrifice of property, which would have resulted from the plaintiff continuing in possession of the goods and enforcing by sale his rights under the judgment and execution. As to this, the jury found for the plaintiff.

A verdict was entered for the plaintiff for damages assessed by arrangement at 40*s.*, with leave to move to enter a verdict for the defendant, on the ground that the deeds constituted an act of

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bankruptcy, and that the property comprised in them passed to the defendant as assignee under the bankruptcy.

A rule having been obtained accordingly, the Court of Queen's Bench made it absolute, holding that as the creditors could have interfered under s. 73 of the Bankruptcy Act, 1861, there was no sufficient equivalent for the assignments to the judgment creditor, and that they were therefore void and an act of bankruptcy. (1)

June 15. *Quain, Q.C.* (with him *Kemplay* and *G. Bruce*), for the plaintiff, urged the same arguments as in the Court below. He cited *Pennell* v. *Reynolds* (2); *Bitlestone* v. *Cooke* (3); *Whitmore* v. *Claridge*. (4)

S. Temple, Q.C., for the defendant, urged that if the present assignments were held good, s. 73 of the Bankruptcy Act, 1861, might always be evaded. (5)

Cur. adv. vult.

Nov. 26. The judgment of the Court (Kelly, C.B., Bramwell, Channell, and Pigott, BB., Byles and Montague Smith, JJ.) was delivered by

KELLY, C.B. The question in this case is, whether a trader,—against whom a judgment had been obtained for 10,000*l.* and upwards, and the judgment creditor having levied between 3000*l.* and 4000*l.*, and afterwards sent in a second execution and seized for 6500*l.*, and upwards,—by executing to the judgment creditor a mortgage of the whole of his estate and effects, committed an act of bankruptcy. The jury have found that the mortgage was bonâ

(1) Law Rep. 2 Q. B. 634.

(2) 11 C. B. (N.S.) 709.

(3) 6 E. & B. 296; 25 L. J. (Q.B.) 281.

(4) 31 L. J. (Q.B.) 141; in error, 33 L. J. (Q.B.) 87.

(5) 24 & 25 Vict. c. 134, s. 73:—"If any execution shall be levied by seizure and sale of any of the goods and chattels of any trader debtor, upon any judgment recovered in any action personal, for the recovery of any debt or money demand exceeding 50*l.*, every such debtor shall be deemed to have committed an act of bankruptcy from the date of the seizure of such goods and chattels; and unless in the meantime a petition for adjudication of bankruptcy against the debtor be presented, the sheriff shall proceed with the execution, and shall at the end of seven days after the sale, pay over the proceeds to the execution creditor, who shall be entitled thereto notwithstanding the act of bankruptcy, unless the debtor be adjudged a bankrupt within fourteen days from the day of the sale, in which case the money so recovered by the creditor shall be paid by him to the assignee under the bankruptcy," &c.

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fide, and executed to save expense and to make the most of the property. But notwithstanding this finding, we are of opinion that the trader has committed an act of bankruptcy. It is contended for the plaintiff, the judgment creditor, who sues the defendant, the assignee of the bankrupt, for the value of the property seized, of which he had possessed himself, that although in general the assignment of all the estate and effects of a trader is an act of bankruptcy, yet it is not so where the debtor takes what has been called an equivalent; and *Bitlestone* v. *Cooke* (1) and other cases shew that where, at the time of the assignment of the estate, the debtor obtains a further advance of money, this advance may be deemed an equivalent. In this case, however, there is no such equivalent; and, as far as we can see, no equivalent at all. The debtor had the choice of allowing the judgment creditor to sell the property seized, and so, by means of the proceeds, satisfy the judgment debt, or of executing this mortgage, by which he assigns and transfers the estate and effects, instead of the proceeds upon the sale, to the judgment creditor. By adopting this latter course he divests himself of the whole of his property, and leaves not a single shilling to be applied in satisfaction of the claims of any one of his creditors. He, in fact, makes over the whole of his property to the one favoured creditor who has obtained the judgment, leaving nothing whatever for his other creditors. If he had allowed the law to take its course, and the judgment creditor to sell the property which he had seized, any other creditor might, under the 73rd section of the Bankrupt Act, have treated the seizure and sale as an act of bankruptcy, and by obtaining an adjudication within a fortnight, would have enabled the creditors, through the assignees in bankruptcy, to recover the money, the proceeds of the sale, from the judgment creditor, and apply it to the use and benefit of the creditors at large.

In the state of the law before this statute, when the seizure and sale under an execution were not an act of bankruptcy, and the execution creditor was entitled to the proceeds upon the sale, it may have been indifferent as between the execution creditor and the other creditors whether the goods were sold under the execution or transferred by bill of sale to the execution creditor. But

(1) 6 E. & B. 296; 25 L. J. (Q.B.) 281.

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in the altered state of the law this is no longer so, and the plaintiff in this case clearly obtains, by means of the bill of sale as between himself and the other creditors, payment of his whole debt, and takes away all the property of the bankrupt, which, if he had proceeded with the execution, would have been distributable among the general creditors under a bankruptcy.

In *Bitlestone* v. *Cooke* (1), one of the cases referred to, it is observed by Crompton, J., that "the old cases clearly established the rule that the conveyance of a trader's property, leaving it no longer in his option whether he would continue his trade, was in law an act of bankruptcy, as necessarily defeating his creditors. On this an exception has been engrafted, that the conveyance is not an act of bankruptcy if it be for an equivalent." In this case, not only, as already observed, is there no new advance to constitute an equivalent, but there is no conceivable benefit whatever accruing to the creditors. It is said that the mortgagee, by leaving the debtor in possession of his house and property, might enable him to carry on his business and retrieve his affairs; but here the debtor had ceased to trade two months before, and the saving of expense and the avoiding the sacrifice of property by a forced sale, which seem to have induced the jury to treat the mortgage as bonâ fide, were a benefit only to the judgment creditor, the mortgage, whatever might ultimately be the produce of the property, leaving absolutely nothing for the other creditors. If a transaction of this nature could be protected against the operation of the bankrupt laws, every debtor might at any time, by suffering a judgment and execution, and then assigning the property seized to the judgment creditor, convey away the whole of his estate to this one favoured creditor, defrauding every other creditor of the whole amount of his debt, the very evil which the 73rd section of the Bankrupt Act was enacted to prevent.

We are therefore of opinion that the assignee is entitled to this property, and that the judgment of the Court of Queen's Bench should be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Merriman & Pike.*

Attorneys for defendant: *Reed, Phelps, & Sidgwick.*

(1) 6 E. & B. at p. 311; 25 L. J. (Q.B.) at p. 289.

THE QUEEN, on The Prosecution of THE OVERSEERS OF ST. MARY, ISLINGTON, Respondents; *v.* THE OVERSEERS OF THE PARISH OF SCULCOATES, Appellants. 1868 *Nov.* 18.

Poor—Suspended Order of Removal—Expenses of Maintenance under 35 *Geo.* 3, *c.* 101, *s.* 28; 49 *Geo.* 3, *c.* 124, *s.* 3; 28 *&* 29 *Vict. c.* 79, *s.* 8.

By 35 Geo. 3, c. 101, s. 2, if it appear to the justices that any person ordered to be removed is unable to travel through sickness, or that it would be dangerous for him to do so, they may suspend the execution of the order until they are satisfied it may be executed without danger to any person who is the subject thereof; and the charges incurred by such suspension may by the said justices be directed to be paid by the parish of settlement, in case any removal shall take place, or in case of the death of such poor person before the execution of such order. By 49 Geo. 3, c. 124, s. 3, where any order of removal shall be suspended on account of the dangerous sickness of any person thereby directed to be removed, the execution of such order shall also be suspended for the same period with respect to every other person named therein.

On the 19th of November, 1860, an order was obtained for the removal of J. G. and E. his wife from St. M. to S., and on the same day the order was suspended on account of the sickness of J. G., and he remained incapable of being removed until he died on 13th of June, 1861. Shortly before J. G.'s death E. became unable to travel by reason of sickness, and continued sick until she died in April, 1867, having in March, 1866, become irremoveable under 28 & 29 Vict. c. 79, s. 8, by reason of having resided before November, 1860, for one year in St. M. without receiving parish relief. An order having been obtained after the death of E. by St. M. on S. for the expenses of maintenance of E. subsequent to the death of J. G., under 35 Geo. 3, c. 101, s. 2:—

Held, that although the order of removal was suspended in consequence of the sickness of J. G., it continued suspended as to E., and that all the expenses of her maintenance up to March, 1866, must be paid by S.

Held, also, that the order for the payment of the expenses was rightly made in April, 1867, on the death of E., although she had become irremoveable in March, 1866, by virtue of 28 & 29 Vict. c. 79, s. 8.

On an appeal against the order of two justices for the county of Middlesex, dated the 30th of May, 1867, for the payment by the overseers of the parish of Sculcoates to the overseers of the parish of St. Mary, Islington, of the sum of 24*l.* 12*s.* 6*d.*, the balance of 31*l.* 17*s.* 6*d.*, the amount of charges alleged to have been incurred by the parish of St. Mary by the suspension of an order for the removal of one John Gibson, and Elizabeth, his wife, from the parish of St. Mary to the parish of Sculcoates, the quarter sessions confirmed the order, subject to the opinion of the Court upon the following case:—

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1. On the 19th of November, 1860, an order was made by two justices for the county of Middlesex for the removal of John Gibson, and Elizabeth his wife, from the parish of St. Mary, Islington, to the parish of Sculcoates, as the place of their settlement, and on the same day the order was suspended by the same justices on account of the sickness and infirmity of John Gibson.

2. The order suspending the order of removal was as follows:— "Whereas it appears unto us, the justices making the within order of removal, that the therein named John Gibson is unable to travel by reason of sickness and infirmity of body, and that it would be dangerous for him so to do, we do hereby suspend the execution of the said order of removal until we or any two justices of the peace for the county are satisfied that it may be safely executed without danger."

3. John Gibson continued sick and infirm up to the time of his death, and by reason of such sickness and infirmity could not be removed from the parish of St. Mary during his lifetime.

4. The paupers, John and Elizabeth Gibson, resided together in the parish of St. Mary continuously from the date of the order of removal and suspension, until the death of John Gibson. At the date of the order of removal and suspension Elizabeth Gibson was about seventy-nine years old, but she was not sick or unable to travel, nor would it then have been dangerous for her to have done so. Some time after the date of the order, and shortly before her husband's death, she became unable to travel by reason of sickness and infirmity of body, and it would then have been dangerous to have removed her under the order.

5. John Gibson died on the 13th of June, 1861, in the parish of St. Mary, and Elizabeth thereupon, under the provisions of 9 & 10 Vict. c. 66, s. 2, became and continued irremoveable from the parish of St. Mary, for the period of twelve calendar months next after his death. From the time when she became unable to travel up to the time of her own death, she continued unable to travel by reason of sickness and infirmity, and it would have been dangerous to have removed her to Sculcoates at any time during such last mentioned period.

6. After her husband's death she remained a widow, and continued to reside in the parish of St. Mary until her own death.

7. The order of removal of the 19th of November, 1860, was never superseded, nor was a fresh order for the removal of Elizabeth Gibson obtained after the death of John Gibson, and the execution of the order of removal never was suspended by the justices by reason of any sickness or infirmity or inability of Elizabeth Gibson, or of its being dangerous for her to travel, nor was any further suspension of the order directed by the justices after the 19th of November, 1860.

8. On the 25th of March, 1866, Elizabeth Gibson became irremoveable from the parish of St. Mary, under the provisions of 28 & 29 Vict. c. 79, s. 8, and so continued, and was irremoveable therefore at the time of her death, in consequence of her residence for one year without relief in the parish of St. Mary, before the 19th of November, 1860.

9. Elizabeth Gibson died on the 10th of April, 1867.

10. From the date of the order of removal until the death of John Gibson, the paupers were relieved by the parish of St. Mary, and after the death of John Gibson, his widow Elizabeth Gibson continued up to the time of her own death, without interruption, to receive relief of 2*s.* 6*d.* a week from them.

11. On the 4th of February, 1863, the parish of Sculcoates paid the parish of St. Mary 7*l.* 5*s.* 6*d.*, being the whole of the charges and expenses incurred by them in the relief of the paupers up to the date of the death of John Gibson, but refused to pay the further sum then demanded of them by the parish of St. Mary, for the charges and expenses incurred in the weekly relief of Elizabeth Gibson from the 13th of June, 1862, when the period of her irremoveability as widow under 9 & 10 Vict. c. 66, s. 2, ended.

12. From the 4th of February, 1863, until the death of Elizabeth Gibson, accounts and statements of the charges and expenses incurred in the weekly relief of Elizabeth Gibson were regularly delivered quarterly to the parish of Sculcoates, and payment of the amount thereof respectively was, always at the time of the delivery of the several accounts to such parish, demanded by the parish of St. Mary, as due to them for the relief so given to Elizabeth Gibson.

13. Payment of the accounts and charges respectively was always refused by the parish of Sculcoates, and they have not paid

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them, and have never paid anything for the relief or maintenance of Elizabeth Gibson since the death of her husband, but no complaint for nonpayment of any of the accounts or charges or expenses so incurred for her relief or maintenance was made to the justices, nor was any application for an order of the justices for payment of any part thereof made till the 30th of May, 1867, when the order appealed against was applied for and obtained.

14. The parish of St. Mary have not charged the parish of Sculcoates with the expenses incurred in the relief or maintenance of Elizabeth Gibson between the date of John Gibson's death and the 13th of June, 1862, nor for any of the expenses incurred in maintaining or relieving her after the 25th of March, 1866, when she became irremoveable from the parish of St. Mary, as above mentioned, and the sum of 24*l.* 12*s.* 6*d.*, mentioned in the order of the 30th of May, 1867, is solely composed of the weekly payments so made by the parish of St. Mary, as aforesaid, between the 13th of June, 1862, and the 25th of March, 1866.

It was contended on behalf of the parish of St. Mary, that although the order of the 19th of November, 1860, was suspended under 35 Geo. 3, c. 101, s. 2 (1), solely in consequence of the illness of John Gibson, it was by the statute 49 Geo. 3, c. 124, s. 3 (2), sus-

(1) 35 Geo. 3, c. 101, s. 2:—"And whereas poor persons are often removed or passed to the place of their settlement during the time of their sickness, to the great danger of their lives; for remedy thereof, be it enacted that in case any poor person shall from henceforth be brought before any justice or justices of the peace for the purpose of being removed from the place where he or she is inhabiting or sojourning, by virtue of any order of removal, or of being passed by virtue of any vagrant pass, and it shall appear to the said justice or justices that such poor person is unable to travel by reason of sickness or other infirmity, or that it would be dangerous for him or her so to do, the justice or justices making such order of removal or granting such vagrant pass, are hereby required and authorized to suspend the execution of the same until they are satisfied that it may be safely executed without danger to any person who is the subject thereof; . . . . and the charges proved upon oath to have been incurred by such suspension of any order of removal, may, by the said justices, be directed to be paid by the churchwardens and overseers of the parish or place to which such poor person is ordered to be removed, in case any removal shall take place or in case of the death of such poor person before the execution of such order." . . .

(2) 49 Geo. 3, c. 124, s. 3:—"In order to avoid any pretence for forcibly separating husband and wife or other persons nearly connected with or related to each other, and who are living together as one family at the time of any order of removal made or vagrant pass

pended as to the other person named therein, and that therefore all the expenses occasioned by such suspension should be paid by the parish of Sculcoates, and also that as the widow could not be removed on the 13th of June, 1862, by reason of her illness, the parish of St. Mary was entitled to the expenses incurred in maintaining her from that date up to the 25th of March, 1866, when the change in the law took place. It was further contended on behalf of such parish that but for her illness the order could have been executed on the 13th of June, 1862, and that as the suspension could not then be taken off because it could not then be safely executed in respect to Elizabeth Gibson, such parish was entitled to the expenses before mentioned; and it was further contended that by 35 Geo. 3, c. 101, s. 2, the justices only had power to make an order on the death or removal of the paupers.

It was contended on behalf of the parish of Sculcoates, that the order of the 19th of November, 1860, ought to have been superseded and a fresh order obtained for the removal of Elizabeth Gibson on the 13th of June, 1862, which last mentioned order might have been suspended in consequence of her illness. It was further contended on behalf of the parish of Sculcoates, that the order of the 19th of November, 1860, for the suspension of the order of removal, became exhausted and a dead letter upon the death of John Gibson, and could not be kept alive or revived by sickness or infirmity of Elizabeth Gibson, or by reason of its being dangerous for her to be removed, and that the charges for the payment of which the order of the 30th of May, 1867, was made, were not incurred by the suspension of the order of removal within the meaning of 35 Geo. 3, c. 101, s. 2. On behalf of the parish of

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granted during the dangerous sickness or other infirmity of any one or more of such family on whose account the execution of such order of removal or vagrant pass is suspended; be it further enacted and declared that where any order of removal or vagrant pass shall be suspended by virtue of this or of the said recited act (35 Geo. 3, c. 101), on account of the dangerous sickness or other infirmity of any person or persons thereby directed to be removed or passed, the execution of such order of removal or vagrant pass shall also be suspended for the same period with respect to every other person named therein, who was actually of the same household or family of such sick or infirm person or persons at the time of such order of removal made or vagrant pass granted."

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Sculcoates, it was also contended that even assuming that the order of removal remained suspended after the death of John Gibson, the order of the 30th of May, 1867, was bad, and the justices had no power to make it, inasmuch as Elizabeth Gibson was by law actually irremoveable from the parish of St. Mary at the time of her death, and that the sum so ordered to be paid by the parish of Sculcoates was irrecoverable, and the order of the 30th of May, 1867, ought to have been made within six calendar months from the time when the matter of the complaint arose, as required by 11 & 12 Vict. c. 43, s. 11.

The question for the opinion of the Court is, whether upon the facts stated the justices were right in making the order of the 30th of May, 1867, upon the parish of Sculcoates, for the payment of the charges incurred in the relief of Elizabeth Gibson from the 13th of June, 1862, to the 25th of March, 1866.

Poland, for the respondents. By s. 2 of 35 Geo. 3, c. 101, the expenses incurred during the suspension of an order of removal can be recovered on the happening of one of two events, the removal or the death of the pauper; and by s. 3 of 49 Geo. 3, c. 124, to avoid the separation of families, it is provided that an order of removal suspended on account of the sickness or infirmity of any person directed to be removed shall be suspended with respect to every other person named in it. Reading these two statutes together, the order of removal, having already been suspended when Elizabeth Gibson became sick, continued suspended until it could be safely executed without danger to her. There was no period of time at which the order could be safely executed with regard to her, for before John Gibson died Elizabeth was unable to be removed, and when she died one of the events mentioned in 35 Geo. 3, c. 101, s. 2, happened, which entitled the respondents to an order for the expenses incurred for her maintenance. At the death of John Gibson, by virtue of 9 & 10 Vict. c. 66, s. 8, Elizabeth became irremoveable for twelve calendar months, but the order of removal still continued in force although during that time it could not be executed; the respondents, however, do not claim any expenses for that year. The appellants will contend that while Elizabeth was still residing in the respondents' parish she became irremoveable by

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reason of 28 & 29 Vict. c. 79, s. 8, which provides that a residence of one year in a parish, without parochial relief, shall make a pauper irremoveable, and that therefore the respondents cannot recover the expenses of maintenance. But the moment the order was made and suspended, the pauper belonged to the appellant parish; the warrant for her removal had been granted, and was not executed because she was too ill to travel. The 28 & 29 Vict. c. 79, s. 8, confers on the pauper a status of irremoveability after a year's residence, but it does not deprive the relieving parish of the expenses incurred by the suspension of an order before the statute passed. In *Rex* v. *Chagford* (1), it was decided that the relieving parish could not recover the expenses incurred during the suspension of an order where the pauper during the suspension became irremoveable in consequence of an estate having descended to him; but the ground of the decision was, that neither of the events on which alone the order for payment could be made had happened. It will also be contended by the appellants that when John Gibson died the respondents ought to have obtained another order for the removal of Elizabeth, and got it suspended; but *Reg.* v. *Inhabitants of Llanellchid* (2), shews that the order for suspension must be made at the time the order of removal is granted; the justices, therefore, had no power to make a fresh order. It will further be contended that the order for the payment of the expenses was not made within six months from the time the matter of complaint arose according to 11 & 12 Vict. c. 43, s. 11. Elizabeth died on the 10th of April, and the order was made on the 30th of May; it was therefore made in time. The respondents' liability was not to be discharged weekly or monthly; it was a continuous advance of money payable at the death of the pauper; there was no cause of complaint until her death, and it was only then that an order for payment could be obtained. The appellants might have relieved themselves from their liability by payments from time to time, under 14 & 15 Vict. c. 105, s. 8. The account was sent to them quarterly; they did not pay it, and they ought not now to be allowed to say that they will pay nothing.

Digby, for the appellants. The suspended order of removal was exhausted on the death of John Gibson. The justices have no power

(1) 4 B. & A. 235. (2) 2 E. & E. 530; 29 L. J. (M.C.) 102.

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to suspend an order of removal except for a cause existing at the time it was made. It is conceded that the suspension of an order must be contemporaneous with the making of the order. Why? Because the cause of suspension must exist at the time the order is made. The order was suspended during the sickness of John Gibson; if on his death another cause supervened which prevented the removal of Elizabeth, the respondents ought to have obtained a fresh order of removal, and got that order suspended until Elizabeth could be removed. The respondents then would have been entitled to all the costs of maintenance incurred by them: *Rex* v. *Englefield.* (1) The case of *Hill* v. *Thorncroft* (2) is a strong authority that the order of removal can only be suspended at the time it is made; and if after the time it is obtained, the pauper cannot be removed for any cause, the expenses incurred by his non-removal cannot be recovered by the relieving parish. The words of s. 2 of 35 Geo. 3, c. 101, "the changes incurred by *such* suspension may be directed to be paid by the overseers," must mean the charges incurred under the original cause of suspension and not the charges of a fresh cause of suspension which did not exist at the time the order of removal was obtained. The 49 Geo. 3, c. 124, s. 3, provides that if the order cannot be executed on account of the sickness of any person ordered to be removed, it shall be suspended for the *same period* with respect to every person named in it. That is, that so long as John Gibson was ill, Elizabeth could not be removed; but when Elizabeth became ill the order could not be suspended during her illness, because it would then not be suspended for "the same period," but for another and a different period. The mere fact that charges have been incurred under a suspended order, is not enough; there must be either the removal or the death of the pauper; here there has been a death, but not a death at a time when the pauper could be removed, for by 28 & 29 Vict. c. 79, she became irremoveable. *Rex* v. *Chagford* (3) is in point. *Reg.* v. *Chedgrave* (4), decided that where the removal is rendered illegal under 9 & 10 Vict. c. 66, the costs of the pauper's maintenance during the suspension of an order cannot be recovered. In *Over-*

(1) 13 East, 317.
(2) 3 E. & E. 257; 30 L. J. (M.C.) 52.
(3) 4 B. & A. 235.
(4) 12 Q. B. 206; 19 L. J. (M.C.) 54.

seers of Salford v. *Overseers of Manchester* (1), the same point was decided under 24 & 25 Vict. c. 55, and Mellor, J. (2), observes, "The statute has worked injustice to this extent that the appellants are not entitled to be reimbursed the expenses which they would have been reimbursed if the order had been carried out." *Hill* v. *Thorncroft* (3), is also in favour of the appellants.

[LUSH, J. In all those cases there was neither a removal nor death of the pauper.]

The application to the justices for the order for payment of charges was too late. The period of six months under 11 & 12 Vict. c. 43, s. 11, must be calculated from the death of John Gibson, which took place on the 4th of February, 1863.

LUSH, J. I am of opinion that the order of sessions ought to be affirmed. It is abundantly clear that the legislature intended, first, that no pauper should be removed from one parish to another while the pauper was in such a state of infirmity and sickness as to make the removal dangerous, and secondly, that the members of the pauper's family should not be separated one from the other; so that if the order was suspended as to one member of the family by reason of his sickness or infirmity, no other member of the family should be removed during that suspension. We must, therefore, put such a construction upon the words of the statutes as will reasonably carry out that manifest intention of the legislature. It appears to me that as to the first part of the case we can well do so.

The first question is, during what period did the suspension continue to operate? Did it operate only during the illness of the man on account of whose indisposition the order was suspended, or did it continue to operate during the illness of the wife, which supervened upon that occurrence? I have come to the conclusion that the suspension once made continues in operation until every member of the family is able to be removed without danger. Reading 35 Geo. 3, c. 101, by the light of the following statute, which is a declaratory rather than an enacting act, the enactment reads thus: "In case any poor persons shall be brought before any justices for the purpose of being removed, by virtue of any order, from the place where they are inhabiting, and it

(1) 3 B. & S. 599; 32 L. J. (M.C.) 107. (2) 3 B. & S. at p. 603.
9 Jan. 1820 (3) 3 E. & E. 257; 30 L. J. (Q.B.) 52. 7 Jan. 1863

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shall appear to the justices that such poor family, or any of them, are either ill, or unable to travel by reason of sickness, or that it would be dangerous for him or them so to do, the justices making such order of removal are hereby required and authorized to suspend the execution of the same until they are satisfied that it may safely be executed without danger to any person who is the subject of the order." It appears to me the object of these enactments was to comprehend the illness of every member of the family, and that being so, suspension once made continues until any two justices are satisfied that the order may be obeyed without danger to the life of any of the paupers whose settlement is adjudged. That being so, the order of suspension here continued to operate after the death of the husband, during the illness of the wife, and up to the time when she became permanently irremoveable under the subsequent statute; and I cannot agree in the argument that has been put before us, that an application ought to have been made to the justices, for no application could have been successfully made for an order to carry into execution the suspended order of removal. The suspension, when once made, continued as operative in favour of the widow who remained ill after the death of the husband, as it was in favour of the husband during his life. And as it is perfectly clear both from the language of the statute and the decided cases, that no subsequent order or suspension could have been made, the only mode in which we can carry out the manifest intention of the statutes is to hold that the order of suspension must operate until every member of the family is in a state of health fit to be removed.

The next question is, whether the fact that a status of irremoveability under 28 & 29 Vict. c. 79, s. 8 (which makes a pauper irremoveable after one year's residence in the parish), had supervened during the illness of the widow, and before the widow was in a condition to be removed under the order, had the effect of nullifying the order of removal, and of depriving the parish of the power of obtaining the repayment of the expenses which they had incurred in maintaining the pauper up to that time. I am of opinion it has not that effect; and by so holding I think we shall be putting a meaning upon the words of 35 Geo. 3, c. 101, s. 2, which would certainly be just, and not at variance with

what we suppose the legislature had in their minds when the subsequent statute was passed. I am aware that we are under a difficulty, because we shall be putting upon the words of 35 Geo. 3, a meaning that could not have been in the minds of the framers of that act at the time it was passed, because there was no such thing at that time as a pauper acquiring a status of irremoveability, but taking it with the subsequent statute it must have been intended to give the parish, which had incurred expenses in the maintenance of the pauper during the suspension of the order of removal, the means of recouping themselves from the parish upon whom that order was made.

Now although the parish is made to disburse its moneys while the suspension is in operation, the time for the repayment of the money is either when the pauper is removed under the order, or when the pauper dies, if no removal takes place; and singularly enough the legislature have not given the parish the power of recovering the amount expended from time to time, for the justices are only authorized to make the order for repayment in case of the removal of the pauper, or, in case of his death, before the execution of the order; and the legislature did not contemplate the death of the person during a state of irremoveability, because there then was no such state. The question, then, is, whether the fact of a status of irremoveability having supervened, deprives the parish of the power of obtaining payment. I think we may fairly put on these words, "in case of the death of such poor person before the execution of the order," a meaning which will not have the effect of perpetrating the injustice which the appellants contend for, and interpret "death" as including a death at any time, whether after the status of irremoveability has occurred or not; and making the pauper's death the point of time at which the amount due for maintenance is recoverable. No removal has taken place in the present case, that is one of the events that is to happen; but the other event has happened, the pauper has died before the order was executed. On that event, the justices were justified in making the order for the payment of the maintenance.

The answer to the last objection necessarily follows from what I have already said. If the parish could not make the application while the pauper was alive by reason of there having been no re-

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moval, the death of the pauper was the time at which the money became payable, and the application to the justices was therefore made within the six months. On these grounds, I am of opinion that the sessions were right.

HANNEN, J. I am of the same opinion, and for the reasons stated by my Brother Lush.

HAYES, J. I have had doubts upon the subject, but upon the whole I think the conclusion which the Court have come to is right. The provision with respect to repayment is imperative, and the legislature seem to have treated the expenditure as a positive debt, and not as a liability to be defeated by any future occurrence. In justice it ought not to be so defeated; and I think the construction given to the original act by my Brother Lush is but reasonable. If the respondents had gone before the justices at the expiration of the twelve months after the husband's death and applied for an order, the justices would not have granted it, inasmuch as, in the words of the act, they could not have been satisfied that the widow could be removed without danger.

Order of sessions affirmed.

Attorneys for appellants: *Boys & Tweedies.*
Attorneys for respondents: *W. & J. Sparling.*

Nov. 10.

DICKSON *v.* THE SWANSEA VALE AND NEATH AND BRECON JUNCTION RAILWAY COMPANY.

Chose in Action—Assignment of Bond—Equitable Plea and Replication.

4 Ex 393-6
24 Q.B.D. 87
90

Declaration against a railway company on a money bond. Plea, on equitable grounds, that by deed between the plaintiff and defendants it was agreed that when certain instalments which, under the terms of the deed, were to be paid in shares of the defendants became due, the defendants should, in addition thereto, pay to the plaintiff such further sums in Lloyd's bonds as should be equivalent to 75 per cent. of the nominal value of such shares, and that the plaintiff should pay the Lloyd's bonds and interest when they became due, and indemnify the defendants against all loss, and that the bond in suit was a Lloyd's bond delivered to the plaintiff in pursuance of the agreement. Replication, that the plaintiff assigned the bond for a valuable consideration to third persons, of which the defendants had notice; that the third persons never had any knowledge of

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the deed between the plaintiff and defendants, and that the action is brought in the plaintiff's name as trustee for the third persons, who are the beneficial owners of the bond. On demurrer:—

Held, that the agreement in the plea must mean that the bond was to be delivered to the plaintiff for the purpose of raising money on it, and that the replication was a good answer to the plea, as it shewed that the object for which the defendants had given the bond had been carried out, and that the plaintiff was suing only as trustee.

DECLARATION, that the defendants by their bond, dated the 7th of October, 1864, became bound to the plaintiffs in 1000*l*.

Plea, on equitable grounds, that before the making of the bond a deed bearing date the 29th of September, 1864, was made between the plaintiff and the defendants, whereby it was, amongst other things, mutually covenanted and agreed by and between the plaintiff and the defendants that as and when certain instalments and sums which, under the terms of the deed, were to be paid in shares of the defendants became due, the defendants should in addition thereto, when so required by the plaintiff, from time to time pay to the plaintiff such further sums in Lloyd's bonds having three years to run from the date of issue, and bearing interest at the rate of 5 per cent. per annum, payable half-yearly, as should be equivalent to 75 per cent. of the nominal value of any such shares, and that the plaintiff should pay or satisfy the said Lloyd's bonds to be from time to time so issued and delivered to him in accordance with the deed as and when the same respectively became due, and in the meantime should pay all interest which might from time to time become due thereon respectively, and should indemnify and save harmless the defendants from and against the bonds, or any of them, and also from and against all losses, costs, charges, damages, and expenses whatsoever which the defendants might become liable or called upon, or compelled, to pay for or on account of the non-payment thereof, or any of them, or any interest due thereon or by reason of the defendants having entered into the same; that the bond declared upon was and is a Lloyd's bond issued and delivered by the defendants to the plaintiff in pursuance of the covenants and agreements hereinbefore stated, and subject to the covenant and agreements of the plaintiff to pay and satisfy the same as and when the same became due, and to pay the interest, and so as herein aforesaid to indemnify and save harmless the defendants.

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Replication, that the plaintiff assigned the bond for a good and valuable consideration to certain persons, viz., Richard Pigott, James Mann, the younger, John Lloyd, and William Llewellyn Lloyd, of which the defendants had notice, and the said persons had not at the time of the assignment, and never had till after the commencement of this suit, any notice or knowledge of the deed in the plea mentioned, or of any private arrangement between the plaintiff and the defendants with reference to the payment of the bond, or to the liability of the defendants thereon, but they took and accepted the security thereof on the faith of the contract appearing on the face of the bond. And the said persons from the date of the assignment of the bond to them as aforesaid hitherto have been the beneficial owners of the bond, and this action was commenced and is prosecuted in the name of the plaintiff as a trustee for the said persons, and for their sole use and benefit, and not for the use or benefit of the plaintiff or of his creditors under his bankruptcy.

Demurrer and joinder.

Gray, Q.C. (*Gadsden* with him), in support of the demurrer. The bond was given by the plaintiff to the defendants for their accommodation; it was not a negotiable instrument, like a bill of exchange, upon which if money be raised by the holder the acceptor is liable; it is a non-negotiable instrument, which the assignee takes at his peril if he takes it without inquiry. At no period of time could the plaintiff have recovered on the bond, and his assignee can be in no better position: *In re Natal Investment Company.* (1) There the company gave C. debentures, in pursuance of an agreement which provided that part of the price of land sold by C. to the company should be paid in debentures; C. having no title to the land, failed to carry out his agreement; it was held that the holders of the debentures took them subject to all the equities between the original parties. That case governs the present.

Secondly: it was illegal for the company to issue these bonds, they can only legally be issued when the company are actually indebted to their contractor.

[LUSH, J. There is no plea of illegality; that point, therefore, does not arise.]

(1) Law Rep. 3 Ch. App. 355.

Thirdly: the plea merely alleges that the assignees of the bond gave value, but does not state the amount; in equity the assignee would not be entitled to recover more than he advanced, and it does not appear what has been advanced; the replication cannot be supported on equitable grounds, as it does not shew such facts as would entitle the assignee to dismiss a bill for an injunction unconditionally.

G. Bruce (*Jelf* with him), for the plaintiff, was not heard.

COCKBURN, C.J. I am of opinion that we must hold the replication good. This action is brought upon a bond which, primâ facie, must be taken to be a valid bond legally issued. Then the equitable plea must be taken as if the defendants had filed a bill in equity to restrain the action. If they had, the bill would allege that the defendants gave the plaintiff the bond to raise money on it, but by a secret agreement the plaintiff was to pay the bond and the accruing interest as it became due, and indemnify the defendants against all loss. The answer to that would have been the answer which is on this record—that the plaintiff by means of the defendants' act was able to deceive the parties who advanced the money, and that the plaintiff having got the money on the faith of the bond was now the trustee of the persons who advanced it, and being trustee they were suing in his name. That would be an abundant answer in equity, and this being an equitable plea, whatever would be an answer in equity is a good replication.

LUSH, J. I am of the same opinion. The terms of the agreement by the plaintiff and the defendants are, that the plaintiff should pay and satisfy the Lloyd's bonds so issued and delivered to him in accordance with the deed, as and when the same should become due, and should pay all interest that should from time to time become due, and indemnify the defendants against all losses, charges, damages, and expenses. It is therefore perfectly clear that the defendants gave the plaintiff the bonds for the very purpose of raising money on them, and may have contemplated being sued on them. Now, on that state of facts, the plaintiff having raised money on the bonds, the answer set up by the equitable owner is, that the plaintiff is suing as his trustee. There would

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be no legal defence to the action, but in equity, no doubt, if the plaintiff was the owner of the bond, it would be inequitable for him to sue, but directly it is shewn that he has raised money on the bond he stands in a different position, and can sue as trustee of the equitable owner. *In re Natal Investment Company* (1) is not against this view, but in favour of it. The bond in that case was given to a person who agreed to sell some land to that company, but it turned out that he had no land to sell; he, however, raised money on the bond. The argument was that the bond having been made payable to bearer, the company were liable to the assignee; the judgment of the Court was that, as the bond was given for payment of land which the company never got, there was an absolute failure of consideration; that the assignee of a chose in action takes it subject to all the equities between the original parties to the contract, and that the company were not liable. But if the bond had there been given for the purpose of raising money on it, it would have made all the difference.

HANNEN and HAYES, JJ., concurred.

Judgment for the plaintiff.

Attorneys for plaintiff: *Symes, Sandilands, & Humphrey.*
Attorneys for defendants: *Tamplin & Tayler.*

(1) Law Rep. 3 Ch. App. 355.

BISSELL *v.* JONES AND OTHERS.

1868
Nov. 6.

Debtor and Creditor—Deed of Composition—Inequality—Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 192.

By a deed, with the requisite consents, &c., under the Bankruptcy Act, 1861, between the debtor of the first part, P., a creditor, of the second part, and the other creditors of the third part, the debtor covenanted to pay P. a composition of 5*s.* in the pound by two equal instalments at four and twelve months, and the debtor and P., as surety, each covenanted with the other creditors to pay them a composition of 5*s.* in the pound on their respective debts by two instalments as above. The debtor assigned all his effects to P., upon trust to apply the proceeds towards the payment of the above composition, and afterwards towards payment of the remaining 15*s.* in the pound of P.'s debt; it being stipulated that P. should have the advantage of this security for the remainder of his debt in consideration of his undertaking the liability of suretyship; and should stand possessed of the surplus, if any, in trust for the debtor. It was also agreed that if P., as such surety, should arrange with any creditor to make an immediate payment of the composition payable to him with a deduction by way of discount, P. should be at liberty to repay himself out of the trust moneys the whole amount of the composition payable to such creditor. In consideration of the premises, the parties of the second and third parts released their respective debts:—

Held, that the deed was valid and binding on non-assenting creditors under s. 192: for that there was no such inequality in favour of P. as vitiated the deed, as the purchase of his suretyship must be taken to be an advantageous bargain for the creditors at large; and that the clause as to payment in advance was not objectionable, as it must be assumed that P. would only avail himself of it when he could do so consistently with carrying out the trusts.

DECLARATION for goods sold and delivered.

Plea, that the defendants were indebted to the plaintiff and others, and thereupon a deed was made between the defendants and their creditors, relating to the debts and liabilities of the defendants, and their release therefrom; the plea then set out an indenture of the 1st of July, 1867, between the defendants, called the debtors of the first part, three persons in partnership under the firm of Price & Co., of the second part, and all the creditors of the debtors (other than the three persons) of the third part. The deed recited that the debtors were jointly indebted to Price & Co. in 644*l.*, and to other creditors either jointly or separately. The debtors covenanted with the parties of the second part to pay them a composition of 5*s.* in the pound on their debt of 644*l.* by two instalments of 2*s.* 6*d.* at four and twelve calendar months from the 2nd of

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May then last; and the debtors and the parties of the second part (as sureties for the debtors and by way of separate covenant) jointly and severally covenanted with the parties of the third part, that the said covenanting parties or some one of them would pay to the several parties of the third part a composition of 5*s.* in the pound, by two instalments at four and twelve months from the 2nd of May last. Provided that the parties of the second part, or any one of them, should not be liable by their above covenant to a greater amount than 3000*l.*

The debtors then assigned all their property, stock in trade, benefit of contracts, &c., to the parties of the second part, upon trust that they or the survivor "shall, when and as they think fit, sell and call in and convert into money the said premises, and apply the moneys, first, in payment of all the costs of the arrangement and of the deed, and of the expenses of carrying out the trusts. Secondly, in or towards payment of the said composition of 5*s.* in the pound at the times and in the manner before-mentioned, in aid of the covenants for payment of such composition, and so as to indemnify the said sureties from their liability under their aforesaid covenant; and, thirdly, in or towards payment of the remaining 15*s.* in the pound of the said sum of 644*l.* owing to the parties of the second part, it being hereby stipulated that they shall have the advantage of this security for the remainder of their debt in consideration of their undertaking the liability of suretyship, and shall stand possessed of the surplus (if any) of the said moneys, in trust for the debtors. Provided always, and it is hereby agreed and declared, that if the parties of the second part, as such sureties, shall arrange with any creditor to make an immediate payment of the composition payable to him under these presents, with a deduction therefrom by way of discount in consideration of such immediate payment, then and in every such case the sureties or surety making such immediate payment shall be at liberty to repay themselves or himself out of the aforesaid trust premises the full amount of the composition payable to such creditor under these presents without deducting the sum so allowed for discount." . . . . In consideration of the premises, the several persons parties of the second and third part released the debtors from the respective debts due to them.

The plea then alleged that all conditions precedent to make the deed operative and available under the Bankruptcy Act, 1861, and to make the deed binding upon the plaintiff had taken place; and that the plaintiff was an assenting party thereto, and was and is bound by the same.

Replication: That the plaintiff was not an assenting party to the deed as alleged.

Demurrer and joinder.

Macnamara, in support of the demurrer. If the deed is a valid deed under the Bankruptcy Act, 1861, it is quite clear the replication is bad; and the sole question therefore is, whether the deed set out in the plea is valid. Two objections are relied on by the plaintiff; first, it is said that the deed unduly favours the creditors who have become sureties, by allowing them the chance of getting their debt paid in full; but there is nothing unreasonable in giving them this preference in consideration of their making themselves personally liable to the extent of 3000*l.* for the payment of the two instalments to the other creditors. The requisite majority of creditors having assented to the deed, every presumption must be made in its favour; and it lies on those who impeach its validity to shew facts which make unfair any clause which is not on the face of it necessarily unequal. For aught that appears, it may be a most advantageous bargain for the other creditors to have the substantial security of the covenant of the sureties, instead of the precarious chance of realizing a dividend out of the debtors' assets. Secondly, the clause is objected to which allows the sureties to make a present payment of the instalments at a rebate or discount, and then to repay themselves the full instalment; but nothing can be more reasonable than that; and it is obviously for the benefit of the creditors to get paid at once.

The Court then called upon

R. G. Williams, for the plaintiff. The deed is unequal by allowing this preference to the creditors who have become sureties.

[LUSH, J. They may get more than the other creditors or they may get much less.]

It must be assumed when a man enters into a guarantee of this kind that it is most likely he will get something by it.

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[COCKBURN, C.J. Suppose the guarantee had been by a stranger, on condition that he was to have the surplus (if any) after paying the instalments, what objection could there be to that?]

None; but the objection here is, that the guarantors go to make up the requisite number of assenting creditors.

[LUSH, J. There must be more than one half in number assenting as well as three-fourths in value.]

But the assenting majority may be very small creditors, and the sureties so large as to swamp the others in value. *Wells* v. *Hacon* (1) may be relied on by the other side; but there the only advantage the creditor, who became surety for the payment of the instalments to the other creditors, had over them was, that he had a direct covenant from the debtor to pay the instalments, while the others could only avail themselves of a covenant from the debtors with a trustee on their behalf; but that was really no substantial advantage at all, and even, under those circumstances, some of the members of the Court had doubts whether the deed was good. Secondly, the sureties are only to be liable to the extent of 3000*l.*, and if the whole dividends to be paid on the whole debts amount to more than that, and some creditors are paid in advance, then the others will lose the security of the trust fund pro tanto. The assignment by the debtor is not absolute, but saddled with a trust, and therefore this clause as to discounting the instalment goes to enable the sureties to commit a breach of trust, and deprive the creditors of one of the securities to which they have a right to look for the payment of their instalments, viz., the trust fund. Such a discretionary power in a trustee to pay one creditor in preference to another renders the deed invalid: *Thompson* v. *Knight.* (2)

COCKBURN, C.J. As regards the objection to the provision that the trustees, on condition of becoming sureties for the payment to the other creditors of the instalments of the composition, are to be entitled to have their own debt paid in full in the event of there being sufficient assets, I think the case is substantially governed by *Wells* v. *Hacon.* (3) It is true I had doubts in that case as to the validity

10 Jan 1862

(1) 5 B. & S. 196; 33 L. J. (Q.B.) 204. (2) Law Rep. 2 Ex. 42.
(3) 5 B. & S. 196, 206; 33 L. J. (Q.B.) 204, 207. 10 Jan 1862

of the deed. "But on the other hand," I said, "I cannot but perceive that such an arrangement may be beneficial to the body of the creditors;" that may be still more so here. If we saw any reason to think the agreement collusive, or calculated to give an inordinate advantage, we might hold the deed invalid. But we must assume that the arrangement being assented to by the requisite majority of creditors is for the benefit of all. The tendency of the later decisions is to hold that the legislature intended by these enactments to give the majority a power to decide, notwithstanding the dissent of the minority, what is most advantageous for the general body. How far it may have turned out well in practice to give this power it is not for us to consider, but for the legislature. I think we ought to abide by what was decided in *Wells* v. *Hacon*. (1) We must therefore look to see if there is anything so collusive or extravagant as to induce us to say that it ought not to bind the non-assenting creditors. Now it would appear that there is an insolvent estate, which will possibly pay 5*s*. in the pound,—it is doubtful whether so much,—but there are a certain firm of creditors who are satisfied that it will realize more than that, and agree to become sureties and guarantee the payment of dividends to that amount, and also in certain cases to accelerate the time for payment, on condition that if they by their diligence manage to realize more, the surplus shall go to discharge their own debt in full. If the majority of creditors see that arrangement will be advantageous for them, why is not the deed valid, there being nothing to shew that the arrangement is in any way collusive? I can see no reason.

As regards the second point, I quite agree that the construction of the clause is that the trustees, who are to realize and distribute the assets by instalments, are not authorized to deal with the trust fund otherwise than if no such clause had been inserted; but when the assets have been partially collected so as to afford a promise of the payment of a dividend, then if the sureties choose to anticipate the time of payment, and pay the composition minus discount to any creditor in anticipation, they may when the time comes take credit for the payment in full instead of only the amount minus the discount; but this assumes that there will be

(1) 5 B. & S. 196; 33 L. J. (Q.B.) 204. 10 Jan Rel 1862

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no breach of trust; and therefore the argument for the plaintiff falls to the ground.

LUSH, J. I am of the same opinion. The statute intended to allow the prescribed majority of creditors to make such arrangements as they might deem advantageous, and a deed made with the assent of such majority is good and binding on the whole body, provided it is not made collusively; and if it be bonâ fide, we have no power to inquire whether a particular stipulation is or is not proper. But the deed must be such a deed as is contemplated by the statute, that is a deed for the general and equal benefit of all the creditors; and if it puts non-assenting creditors in the same position as the assenting creditors, it is valid and binding. Here there is no inequality; the assenting creditors, with the exception of the trustees, are in no better position than the others, and the trustees purchase their advantage, if it be one, by becoming sureties. Then as to the other clause, the deed intends the trustees to make a rebate, and then if they advance the money, they may put themselves in the place of the creditors whom they have paid; but I agree with my Lord that they must not do this unless the funds will enable them to carry out the trusts and pay the dividend when due to all the creditors. If the trustees are going to abuse their trust, any creditor, whether assenting or non-assenting, can go to the court of bankruptcy and prevent the breach of trust.

HANNEN and HAYES, JJ., concurred.

Judgment for the defendants.

Attorneys for plaintiff: *Neal & Philpot.*
Attorneys for defendants: *Rogerson & Ford.*

WOODWARD AND ANOTHER *v.* PELL.

1868
Nov 27.

Bill of Exchange—Liability of Acceptor after Judgment, Arrest, and Discharge in another Action on same Bill.

A bill of exchange, accepted by the defendant, was indorsed to C., who indorsed it in blank. A banking company, the holders of the bill at maturity, commenced actions against C. and the defendant. On the 21st of March, C. paid the amount due on the bill, and an order was made to stay proceedings in the action on payment of the taxed costs; these costs were paid on the 13th of April, and the bill was then handed by the bank to C., who, being indebted to the plaintiffs in a larger amount, delivered it to them. Judgment was signed in the action by the bank against the defendant on the 3rd of March, and a ca. sa. was lodged with the sheriff on the 6th of March. On the 29th of March the defendant was arrested, and discharged the same day by order of the bank on payment of the costs of suit. The plaintiffs having brought an action on the bill against the defendant:—

Held, that C. had a vested right of action against the defendant on payment of the bill on the 21st of March, for the fact that C. had not paid the costs on the 21st of March only gave the bank a lien upon the bill, but did not affect his right to or remedy on the bill; and neither the subsequent taking in execution nor the discharge of the defendant could afford him any defence to an action by C., or take away C.'s vested right: and the plaintiffs therefore were entitled to recover.

DECLARATION on a bill of exchange drawn upon the defendant by Edward Cresswell & Sons to their own order, accepted by the defendant, indorsed by Edward Cresswell & Sons to Henry William Cresswell, and by him indorsed to the plaintiffs.

There were also the money counts.

The plea and replication to the first count, on which issue was joined, disclosed the same facts as are given more in detail in the case; and as the Court had power by agreement to amend the pleadings, it is unnecessary to set them out.

At the trial before Keating, J., at the Gloucester summer assizes, 1866, a verdict was found for the plaintiffs for 300*l.*, subject to the opinion of the Court upon the following case:—

The bill of exchange upon which the action was brought was a bill for 300*l.*, dated the 7th of August, 1865, payable to drawer's own order, four months after date, drawn by Edward Cresswell & Sons upon and accepted by the defendant. The bill was duly indorsed by Edward Cresswell & Sons to Henry William Cress-

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well; he indorsed it in blank and handed it to J. C. Hodges, who indorsed to his bankers, the Metropolitan and Provincial Banking Company; and they held the bill, as such indorsees, at maturity.

The bank commenced three actions upon the bill against the defendant, against Edward Cresswell & Sons, and against Henry William Cresswell.

In the action by the bank against H. W. Cresswell, the indorser, the writ was issued on the 15th of January, 1866. On the 13th of March, 1866, H. W. Cresswell, for the purpose of taking up the bill, handed over to J. C. Hodges securities for an amount equal to that of the bill, and out of the proceeds of those securities, and on behalf of H. W. Cresswell, Hodges paid, on the 21st of March, 1866, the amount due on the bill to the Metropolitan and Provincial Banking Company, whereupon, on the 3rd of April, an order was made to stay proceedings on payment of costs. The bill remained in the hands of the bank until the costs were taxed and paid. The costs were taxed at 21*l.* 11*s.* 4*d.*, and that sum was, on the 13th of April, 1866, paid to the bank by the plaintiffs, as solicitors for, and on behalf of, H. W. Cresswell; and on the same day the bill was delivered over to the plaintiffs as such solicitors. Two or three days afterwards, and before the 31st of May, 1866, the plaintiffs, to whom H. W. Cresswell was indebted for costs in an amount larger than that of the bill, applied to him for money on account, and he transferred to them the bill, which had already been indorsed in blank by him as aforesaid, in part payment of their claim against him; but there was no further or other indorsement of the bill to the plaintiffs.

In the action by the bank against the defendant, the acceptor, the writ was issued on the 29th of December, 1865. Judgment was signed on the 3rd of March, 1866, and on the 6th of March the bank lodged a ca. sa. against the defendant on the judgment with the sheriff of Middlesex, indorsed to satisfy 310*l.* 9*s.* 11*d.*, being the amount due on the bill and costs, and 1*l.* 5*s.* costs of execution, &c. On the 29th of March the defendant, having been arrested in another suit, was informed by the sheriff's officer that he held this ca. sa. The sheriff's officer communicated then with the bank, and received an order to detain defendant under their

execution, which he did accordingly; and about four hours afterwards he received an order to discharge the defendant on payment of 9*l.* 1*s.* 10*d.* and the fees.

This payment was made, and the defendant was released.

No receipt was given by the sheriff for the payment made to him by the defendant, but on the 12th of April, when the sheriff paid over to the bank the 9*l.* 1*s.* 10*d.*, the following receipt was given:—

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"Received, April 12, 1866, of Mr. Bunn, officer to the sheriff of Middlesex, 9*l.* 1*s.* 10*d.*, in discharge of debt and costs herein.

"For plaintiff's attorney, J. Holditch."

This sum of 9*l.* 1*s.* 10*d.* was the amount of taxed costs due to the bank in their action against the defendant. No further or other payment was at any time made by the defendant in respect of the bill.

The plaintiffs, on the 31st of May, 1866, and after the bill had been transferred to them by H. W. Cresswell in manner aforesaid, commenced the present action.

The Court were to have liberty to make such amendments in the pleadings as the judge at nisi prius might have made, and to draw any inferences of fact which a jury ought to have drawn.

The question for the Court was, whether, upon the facts, the defendant remained liable to pay the amount of the bill to the plaintiffs.

H. Matthews, Q.C., for the plaintiffs. The bank being the holders of the bill at maturity, commenced actions against the defendant, the acceptor, and Cresswell an indorser. The bank obtained judgment against the defendant on the 3rd of March, and lodged a ca. sa. on the 6th of March, but they did not take him and discharge him till the 29th. On the 21st Cresswell paid the bill and he then became the holder, and he could sue the defendant or any other party prior to himself, or negotiate it, as he did, and give a right to the plaintiffs. "A bill of exchange is negotiable ad infinitum until it has been paid by or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems he may sue the acceptor upon the bill; and if, instead of

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suing the acceptor, he put it into circulation upon his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor:" per Lord Ellenborough in *Callow* v. *Lawrence* (1) cited in Byles on Bills at p. 157, 8th edit. Judgment and execution issued against any party to a bill, without satisfaction, are no extinguishment of the debt either as against him or any other party: *Tarleton* v. *Allhusen.* (2) In *Thompson* v. *Parish* (3), Cockburn, C.J., after alluding to the judgment of Littledale, J., in *Beard* v. *M'Carthy* (4), says, "With the greatest respect for the very learned judge who decided that case, I cannot help thinking that in saying 'that taking the defendant in execution is the same as if the defendant had paid the debt and costs,' he has gone too far. The effect of taking the debtor in execution is, no doubt, to suspend all other remedies against him; but it is going too far to say that the debt is thereby altogether extinguished." And Willes, J., in the same case, cites *Foster* v. *Jackson* (5), as expressly laying down the law, that taking a debtor in execution under a ca. sa. is not an actual satisfaction. (6) Cresswell, therefore, was still liable on the bill at the time he paid it; and although *English* v. *Darley* (7) may be an authority that the bank, by releasing the acceptor from custody, discharged all the indorsers, yet that doctrine is inapplicable in the present case, as Cresswell had already paid the bill under legal pressure. This is simply the case of one of several sureties sued by the creditor concurrently with the principal debtor. And the surety having paid under pressure of the action, he has an immediate right of action against his principal, which no subsequent act of a third person can divest.

[HAYES, J. Before the principal debtor had been taken or released from custody, the debt had been lawfully discharged by his surety; it would be monstrous if the subsequent voluntary act of a third person could deprive the surety of his right of action against the principal.

(1) 3 M. & S. at p. 97.
(2) 2 Ad. & E. 32.
(3) 5 C. B. (N.S.) at pp. 692, 698; 28 L. J. (C.P.) at pp. 156, 158. (a)
(4) 9 Dowl. 136.
(5) Hob. at p. 59.
(6) See *Claxton* v. *Swift*, 2 Show. 441, 503.
(7) 2 B. & P. 61.

(a) 5 Jur. N.S. 986, 987.

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LUSH, J. After the bill had been paid by Cresswell, could the bank have proceeded against the defendant?]

In Byles on Bills, 8th ed. p. 205, it is said, "The better opinion seems to be, that to an action against the acceptor payment by the drawer is no plea."

A. S. Hill, Q.C., for the defendant. It is a fallacy to say that Cresswell paid and became the holder of the bill on the 21st of March; it was not till the 13th of April that he had perfected his right to the possession of the bill, when it was handed over to him. Up to that time the bank were the holders of the bill, and not Cresswell; and they, by discharging the acceptor out of custody, discharged and extinguished the bill and all rights upon it: *Jaques* v. *Withy*. (1) Cresswell had acquired no right of action at that time.

H. Matthews, in reply. The bank had no right to the bill after it had been paid in full on the 21st of March; and therefore (conceding which is a very doubtful point, that the discharge of the acceptor from execution without payment would otherwise have extinguished the bill), the discharge of the defendant could have no operation on Cresswell's vested right of action.

LUSH, J. I had some difficulty at first, but I have come to a conclusion satisfactorily to my own mind that our judgment ought to be for the plaintiffs. The bank were indorsees and holders of the bill at its maturity. They brought actions against the defendant, the acceptor, and two indorsers of the bill. In the action against the defendant, the acceptor, the bank obtained judgment on the 3rd of March, and on the 6th of March a ca. sa. was lodged with the sheriff. On the 21st of March, before the defendant was taken in execution, Cresswell, one of the indorsers who had been sued, paid to the bank the amount of the bill. If he had paid the costs also, he would have been entitled at once to the possession of the bill. Assuming, therefore, that the non-payment of the costs, to which I will advert presently, made no difference, Cresswell, having paid the bill as indorser or surety, had a right of action at once against the defendant, the principal, or person primarily liable, and this right was vested on the 21st of March. On

(1) 1 T. R. 557.

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the 29th of March the defendant was detained in execution, and if the bank had continued to hold him that would have been no answer by the defendant to an action by Cresswell, and neither in my opinion would his discharge have been any answer. It would be monstrous, as my Brother Hayes observed, if the act of a third person in discharging the principal out of custody could take away the prior vested right which the surety had against him. The discharge was a mere voluntary act by the bank, although it might be a very proper act on their part. Then, does the fact that Cresswell had only paid the amount of the bill, and not the costs, before the discharge of the defendant, make any difference? Clearly not. He paid sufficient to cover the amount due on the bill, and specifically appropriated it to the payment of the bill; and the only effect of the nonpayment of the costs was, that the bank had a lien upon the bill till the costs were paid; but Cresswell's right to the bill, and his rights and remedies on the bill against the defendant, were just the same as if he had paid the costs on the 21st of March, and the bill had then been handed to him. He was then the holder of the bill. Therefore, Cresswell having this vested right of action on the bill against the defendant, it would be unreasonable in the extreme if Cresswell, the surety, were to be deprived of his right of action against the principal, because the principal by the voluntary act of a third person had been discharged; and Cresswell having this right of action on the bill could transfer it to the plaintiffs, who are therefore entitled to recover.

HANNEN and HAYES, JJ., concurred.

Judgment for the plaintiffs.

Attorney for plaintiffs: *H. A. Maude.*
Attorneys for defendant: *Elmslie, Forsyth, & Sidgwick.*

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Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Construction of Composition Deed—Release—Deed unduly favouring Debtor.*

In an action of debt, the defendant pleaded a deed between himself, a trustee, and all his creditors, by which the defendant covenanted with the creditors respectively, if the deed were duly registered under the Bankruptcy Act, 1861, to pay to each of his creditors such sums as should in the aggregate be at the rate of 2*s.* in the pound upon the amount which would have been proveable against him if he had become bankrupt at the date of the registration, by two instalments of 1*s.* each. And it was agreed that the trustee should hold the defendant's property, already assigned to him, in trust for the defendant until default, provided that, if default was made in payment of the composition or any instalment thereof, the trustee should sell and apply the proceeds, inter alia, in payment rateably of the debts due to the creditors. The creditors for themselves respectively released the defendant from the debts due to the creditorsr espectively; and it was agreed and declared that in case default should be made, contrary to the covenant, in payment of the composition, or any instalment thereof, to the creditors respectively, then the release should be at an end, and the creditors should be at liberty to sue for the full amount of their respective debts less any amount already received. The plea then averred that the deed had been duly registered under s. 192, and the plaintiff was bound thereby. The plaintiff replied that the instalments due to divers creditors, other than the plaintiff, had not been paid or tendered. On demurrer:—

Held, that, upon the proper construction of the deed, the release was an absolute release by each of the creditors of his own debt, subject to be avoided as against him if the instalments due to him were not paid; that the plea was therefore good without alleging such payment or tender; and that the replication was bad.

The plaintiff also replied, on equitable grounds, that he was not an assenting creditor; that at the time the deed was executed the defendant was possessed of available assets sufficient to pay a much larger composition than 2*s.* in the pound; that the deed was not bonâ fide entered into or assented to by the majority of creditors for the equal benefit of all the defendant's creditors, but was entered into and assented to by such majority solely from motives of benevolence and kindness to the defendant, and for his sole and only benefit, and without just regard to the rights and interests of the other creditors of the defendant. On demurrer:—

Held, a good replication, as shewing the deed was not valid within s. 192, on the authority of *Ex parte Cowen* (Law Rep. 2 Ch. App. 563).

DECLARATION on ten bills of exchange by the plaintiffs as drawers and payees against the defendant as acceptor, with the common counts.

First plea, that the defendant, before action, made his deed as follows:—The plea then set out a deed of the 5th of December,

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1866, between the defendant, thereinafter called the debtor, of the first part, J. Bowden, who and his executors and administrators were comprehended under the expression of "the trustee," of the second part, and all the creditors of the debtor of the third part. The deed recited that by an indenture of the 25th of October, 1866, made between the debtor of the first part, J. Bowden of the second part, and the creditors of the debtor of the third part, the debtor covenanted with Bowden, and also as a separate covenant with each of the creditors, that he would, within six weeks after registration of the indenture, pay to all his creditors a composition of 3*s.* 6*d.* in the pound, and that by the indenture he assigned to Bowden, his executors, administrators, and assigns, the leasehold messuage, furniture, goods, chattels, and effects therein particularly described; that in consequence of difficulties which had arisen in carrying into effect the covenant of the debtor, it had been agreed between all the parties to the indenture to substitute for the covenants contained in the deed of October, 1866, the covenants contained in the present deed; that the debtor proposed to pay to his creditors a composition of 2*s.* in the pound upon the amount of their respective debts, secured as thereinafter mentioned, and that a majority in number representing three-fourths in value of his creditors, had agreed to accept the composition in full discharge of their several debts; the deed then witnessed "that in pursuance of the proposal and agreement, and in consideration of the release and stipulations thereinafter contained, the debtor covenanted with the trustee, his executors, administrators, and assigns, and as a separate covenant with the creditors respectively, and their respective executors, &c.; that if the deed should be duly registered under the provisions of the Bankruptcy Act, 1861, he would pay to each of the creditors, whether executing or assenting or not, such sums as should in the aggregate be at the rate of 2*s.* in the pound upon the amount which would have been proveable under an adjudication of bankruptcy against the debtor if he had been declared a bankrupt at the date of such registration, by two instalments of 1*s.* in the pound each, and one of such instalments should be payable on the 1st of January, 1867, and the other instalment on the 1st of June then next following. Provided that the creditors should verify their debts by solemn

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declaration, and that the creditors holding securities should receive the composition on the balance of the debts after deducting the value of their securities. It was declared and agreed between the several parties to the deed, that the several hereditaments and premises therein described and assigned by the thereinbefore recited indenture, should be held by the trustee, his executors, administrators, and assigns, in trust for the debtor until default should be made in payment of the composition or any instalment thereof, but charged with the payment of the composition, and after payment thereof respectively at the respective dates and in manner aforesaid, to reassign the trust premises, and every of them, and every part thereof, unto the debtor. Provided always that if default shall be made in payment of the composition or any instalment thereof contrary to the covenant hereinbefore contained, or if default shall be made by the debtor in payment of the rent reserved by the indenture of lease, or in the performance or observance of the covenants on the lessee's part contained in the same indenture, the trustee shall, so far as the trust premises shall be vested in him, sell, dispose of, and realize the same, and shall assign the same premises to the purchaser or respective purchasers thereof, with power to give receipts for the purchase-money, and shall apply the moneys to arise from such sale in payment of all rents and outgoings for the time being, payable in respect of the leasehold messuage and premises, and of the costs, charges, and expenses of the arrangement between the said debtor and his creditors, and of the negotiations preparatory thereto, and of the preparation and execution of these presents, and the registration hereof under the Bankruptcy Act, 1861, and of and attending the execution of the trusts and powers hereof, or of any of them, or in anywise relating to all or any of such matters, and shall apply the residue of such moneys in payment rateably of the debts due to the creditors respectively by the debtor, and shall pay the ultimate surplus of the moneys (if any) unto the debtor." There were covenants by the debtor with the trustee that he would, down to and until such sale, pay the yearly rent of the leasehold premises, and perform all the covenants in the lease; and the following covenant by the creditors: "That in further pursuance of the agreement, and in consideration of the covenants and assignment hereinbefore

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and the stipulations herein contained, the creditors do for themselves respectively release and discharge the debtor from the several covenants on the part of the debtor contained in the hereinbefore recited indenture of the 25th of October, 1866, and from the debts due to the creditors respectively from the debtor, and from all actions, suits, &c., in respect thereof, and it is agreed and declared that in case default shall be made contrary to the covenant in that behalf hereinbefore contained in payment of the said composition, or any instalment thereof, to the creditors respectively, or in case before the composition shall be fully paid to the creditors respectively as aforesaid, the debtor shall be adjudicated bankrupt, or make, or attempt to make, any arrangement with his creditors different to the arrangement hereby provided for them, and in any such case the release herein contained shall be thenceforth at an end, and the creditors shall thenceforth be at liberty to sue for or prove for the full amount of their respective debts less the amount which may have been received by them on account thereof, under these presents or otherwise."

The deed also contained clauses reserving the creditors' right to sue third persons; that the deed was intended to operate as a composition deed executed by a debtor within s. 192 of the Bankruptcy Act, 1861; and that the trustee was a trustee of the covenants contained in the deed for the benefit of all the creditors of the debtor, whether such creditors respectively should execute or assent thereto or not.

The plea then averred that a majority representing three-fourths of the creditors, whose debts respectively amounted to 10*l.* and upwards, did, in writing, assent to and approve of the deed; that the trustee had executed it; that it was duly attested by an attorney; that it was duly registered; that with the deed an affidavit as required by the Bankruptcy Act, 1861, was delivered to the chief registrar; that the deed was stamped, and immediately on the execution of the deed by the defendant, possession of all the property comprised therein, of which the defendant could give possession or order possession, was given to the trustee, "and at the date of the deed recited in the deed, the plaintiffs were creditors of the defendant in respect of the claim pleaded to, and all things necessary in that behalf having happened and been done, the plaintiffs

became and are bound by the deed as if they had been parties thereto, and had duly executed the same."

Second plea: that the first plea is true, and that the defendant was always ready and willing to pay the composition, and tendered and offered to the plaintiffs to pay the same to the plaintiffs according to the deed at the respective times in the deed appointed for payment thereof, and the plaintiffs refused to accept the same.

Third plea: that the first plea is true, and that the plaintiffs discharged the defendant from tendering the composition, and waived such tender and prevented the defendant from tendering or paying the same.

Third replication to the first plea: that default was made by the defendant contrary to his covenant contained in the deed in that behalf, in the payment of the composition to divers, and very many of the the defendant's, creditors mentioned in and within the meaning of the deed (other than the plaintiffs) respectively upon the amounts of their respective debts within the meaning of the deed, by the instalments on the days and times, and in manner in the deed in that behalf mentioned and provided, and although the days and times for the payment of the composition to each of the defendant's last-mentioned creditors by the instalments aforesaid had elapsed before this suit, yet that the composition still remains unpaid to each of the defendant's last-mentioned creditors.

Fourth replication to the second plea similar to the third replication, but alleged that the composition had never been paid or tendered to each of the creditors, or to either of them, by the instalments or in manner in the deed provided.

Fifth replication to the third plea, was similar to the fourth replication.

Sixth replication to the first plea, on equitable grounds, that the pleaded deed in the first plea mentioned was never executed by the plaintiffs or either of them, nor did they nor did either of them ever assent to or approve of the same deed, and that the plaintiffs were not nor were either of them parties to, nor did they nor did either of them ever assent to or approve of either of the two agreements mentioned and referred to in the pleaded deed, that is to say, the alleged agreement first therein mentioned

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and referred to, whereby it is alleged to have been agreed between and by all parties to the pleaded deed to substitute for the covenants, trusts, powers, and provisions contained in and expressed by the indenture of the 25th of October, 1866, mentioned in the pleaded deed, the several covenants, trusts, powers, and provisions contained in the pleaded deed, and the alleged agreement in the pleaded deed secondly mentioned and referred to, whereby it is alleged that a majority, in number representing three-fourths in value of the creditors of the defendant, whose debts respectively amounted to 10*l.* and upwards, had agreed to accept the composition of 2*s.* in the pound, payable as and secured in the manner therein mentioned in full discharge of their several debts and demands, and to execute or in writing assent to or approve of the pleaded deed: And that at the respective times when the two agreements were made and entered into and assented to and approved as aforesaid, and when the pleaded deed was made and executed and assented to and approved of as aforesaid by the majority of the defendant's creditors as in the first plea mentioned, the defendant had and was in possession of available assets sufficient for the payment to the creditors of a much larger composition than 2*s.* in the pound upon the amount of their respective debts, and the two agreements and the pleaded deed were not nor were any of them bonâ fide made, or entered into, or executed, or assented, or approved of by any or either of the defendant's creditors who assented or approved of the same for the equal benefit of all the defendant's creditors mentioned in and within the meaning of the deed: And the agreements and such of them and the pleaded deed were respectively made and entered into and executed and assented to and approved of by the parties thereto, and by the majority of defendant's creditors, solely from motives of benevolence and kindness to and for the defendant and for his sole and only benefit, and without any just regard to the rights and interests of the defendant's other creditors, and to give the defendant a release and discharge from his debts and demands on the payment of the alleged composition of 2*s.* in the pound upon the amount of their respective debts in the pleaded deed and in the secondly mentioned agreement, and the plaintiffs say the same alleged composition of 2*s.* in the pound in truth and in

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fact was only a nominal composition, and wholly disproportionate to the assets of the defendant of which he at the times aforesaid was possessed, and had, and which could, and might, and ought to have been, and were available towards the payment of the defendant's creditors, their debts and demands.

Seventh replication to the second plea, on equitable grounds, that the allegations in the sixth replication are true, "wherefore the plaintiffs refused to accept the alleged tender and offer of payment of the composition in the second plea mentioned."

Eighth replication to the third plea, on equitable grounds, that the allegations in the sixth replication are true, "wherefore the plaintiffs discharged the defendant from tendering the composition, and waived such tender as in the third plea mentioned."

Demurrers to first, second, and third pleas, and joinder.

Demurrers to third, fourth, fifth, sixth, seventh, and eighth replications, and joinder.

H. James, for the plaintiffs. The first plea is bad because it does not allege that the defendant has paid the composition or tendered it to the plaintiffs: *Fessard* v. *Mugnier*. (1) The plea in that case contained an averment that the defendant was ready and willing to pay the composition, and also contained a general averment of conditions precedent. Erle, C.J., said: "The plea states that the defendant was ready and willing to pay to the plaintiff the composition, but it contains no averment that the composition was paid at the time when it was stipulated to be paid, or anything equivalent to averring that it was tendered, it only states that the defendant was ready and willing to pay it: that is not enough;" the Court, therefore, held the plea bad. The release in the present deed is not absolute but conditional; the defendant ought to shew a performance of the condition on which the release becomes binding; the plea ought to aver that there has been no default in the payment of the composition to any one of the creditors. If the plea and replication are read together they show that the condition has not been fulfilled, and therefore that the plea is no answer. Reading, also, the release and condition together, the true construction is that if default in the payment of the composi-

(1) 18 C. B. (N.S.) 286; 34 L. J. (C.P.) 126.

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tion be made to any one creditor, the whole body of creditors are remitted to their original rights; and then, under the previous proviso, any one creditor can have the leaseholds which are assigned to the trustee sold and the proceeds divided rateably among all the creditors. Taking together the covenant to pay the composition, and the proviso that in default of payment the leasehold property shall be sold, and the release and the condition which follows, it is clear that the debtor is bound to pay or tender the composition to every creditor, or else the release cannot be pleaded in bar to an action by any one of them.

[COCKBURN, C.J. I think the word "respectively" in the condition to the release ought not to be read as suggested by the plaintiffs; I think the meaning of the condition is that if any creditor does not get his instalment paid, he only is at liberty to treat the release as a nullity.]

The latter objections apply to the 2nd and 3rd pleas also; and if the construction of the condition to the release contended for by the plaintiffs is right, the 3rd, 4th, and 5th replications are good. The 6th, 7th, and 8th replications are good. It is true that they do not contain an averment of fraud, but they allege a want of good faith. They are pleaded on the authority of *Ex parte Cowen.*(1) According to that case, although the Court will not review the decision of the majority of the creditors as to the quantum of composition they may agree to accept, yet the power to bind the minority must be fairly exercised, and there must be a bonâ fide bargain between the creditors and the debtor. The allegations in these replications bring the case within that decision. If these replications are held to afford no answer to the pleas, a majority of the creditors from motives of benevolence might accept the smallest composition to benefit the debtor; and this would be contrary to the whole scope of the Bankruptcy Act, by which it was only meant to give a power to the majority to be exercised for the benefit of the whole body of creditors. (2)

[LUSH, J. In *Dauglish* v. *Tennent* (3), we held that there must

(1) Law Rep. 2 Ch. App. 563.

(2) *James* further intimated that if the case went to a court of error, he should contend that the release amounted only to a covenant not to sue; and that the pleas were bad, because the composition was not paid into court: see *Bamford* v. *Clewes* (Law Rep. 3 Q. B. 729).

(3) Law Rep. 2 Q. B. 49.

be perfect good faith between all the creditors to make a deed binding on the non-assenting minority, and that if a creditor was induced to sign the deed in consequence of receiving some benefit beyond the rest, it was void.]

Sir G. Honyman, Q.C. (*Lucius Kelly* and *Schalch* with him), for the defendant. By s. 57 of the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), the performance of conditions precedent may be pleaded generally; but neither under that act nor at common law is it necessary to negative or aver performance of conditions subsequent when pleading a deed: Notes to *Thursby* v. *Plant*. (1) The release takes effect on the execution of the deed on the 5th of December, 1866; the condition is, that if the instalment is not paid on the 1st of January, the release shall be void, so that the release is cut down by matter subsequent, that ought to be replied. The Court, by the construction they have put on the release and condition, have already disposed of the 3rd, 4th, and 5th replications. The 6th, 7th, and 8th replications are bad. A deed, executed by the requisite majority of creditors, and as to which all the requirements of the Bankruptcy Act, 1861, have been complied with, is primâ facie unimpeachable. It can only be vitiated by fraud, and there is no allegation of fraud in the replications.

[COCKBURN, C.J. I cannot distinguish this case from *Ex parte Cowen*. (2) I feel bound by that case.]

From the general mode in which the replications are framed, great inconvenience would arise in submitting the question to a jury.

[COCKBURN, C.J. The question for the jury would be, is this a deed entered into for the benefit of the whole body of creditors, or is it a deed entered into by the majority of creditors for the benefit of the debtor only?]

H. James, in reply.

COCKBURN, C.J. As to the objections taken to the first plea, the distinction seems to me to be this. Suppose there had been no release in the deed except a release by implication; suppose the creditors had simply assented to take so much in the pound, there

(1) 1 Wm. Saund. 233 a, n. (2). (2) Law Rep. 2 Ch. App. 563.

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then would have been what would be equivalent to a release by implication, that is, the instalments of the composition on the debt due to any creditor having been paid he would be debarred from any right to insist upon the payment of the remainder; and then the payment of the instalments would have been a condition precedent, and must have been averred by the defendant. But instead of a release by implication there is here an express release taking effect from the execution of the deed; and then there comes a condition that in the event of the covenants entered into by the debtor not being performed, that release shall become inoperative; and what Sir George Honyman says, therefore, is justified, that if by matter ex post facto the creditor wants to get rid of the release, it is for him to reply the facts avoiding it.

As to the 6th, 7th, and 8th replications, I think we are bound by *Ex parte Cowen* (1), and I must say that I entirely concur in the grounds on which the decision is based by the Lords Justices. It seems to me that what the statute intended to do was to substitute a species of commercial domestic forum for the proceedings in bankruptcy. As it was known that proceedings in bankruptcy ate up a very large proportion of an insolvent's assets, it was thought better that the winding-up of his affairs and the liquidation pro tanto of his debts should be left to the more economical management of his creditors. Whenever this was proposed to be done the majority of the creditors were to have power to bind the minority, with the intention that whatever the majority might think advantageous to the whole body of the creditors ought to be made binding upon the minority: so that an obstinate creditor might not stand out and insist upon the payment of his entire debt, and swallow up by proceedings at law the debtors' assets, to the disadvantage of the general body of the creditors. But I never could bring myself to think that it was intended that the majority of the creditors should be enabled to relieve the debtor of his liability to pay his debts as far as his assets would go, at the expense of those creditors who were not disposed to take the same benevolent view of the position of the debtor as the majority of the creditors. I quite concur in thinking that the bona fides of such an arrangement depends upon its being entered into by the

(1) Law Rep. 2 Ch. App. 563.

majority of creditors with an honest intention to take into account that which is most beneficial to the common interest of all, and not to the interest of the debtor as distinguished from that of his creditors. Therefore, I have no hesitation in saying that I entirely concur with the reason of that decision independent of its authority; but its authority is binding upon us sitting here as a court of co-ordinate jurisdiction.

LUSH, J. I am of the same opinion. I bow to the opinion of the Lords Justices as the opinion of a court of co-ordinate jurisdiction. But beyond that, if this point had come before us for the first time, I should be of the same opinion. The statute assumes (it is to be implied from the provisions) that the majority of the creditors who are acting in making an arrangement with the debtors, are acting as creditors, that is, as persons looking after their own interests. The statute gives them credit for making the best arrangement under the circumstances for the benefit of those concerned; but if they act not with any view to their own benefit, but solely with a view to release the debtor, that is not acting within the meaning of the statute, and their proceedings do not bind the minority.

HANNEN, J. I am of the same opinion. I think we are bound by the decision of the Lords Justices, this being an equitable question. If it be thought necessary, this case must be reviewed in a court of error, and it is extremely likely that all the reasons given in that judgment would then meet with my assent. I have not examined them so carefully as I should before expressing a positive opinion that I agree with them; but it is right to say that I do not think that the legislature did intend to exclude motives of benevolence and kindness from the minds of those persons who were enabled to make a binding deed under the statute. I do not think the legislature ever would have thought it necessary to guard against an excess of benevolence and kindness. The mischief from which the commercial community suffers is not an excess of kindness and benevolence on the part of creditors, but actual fraud. Persons are represented to be creditors who are not creditors. If the principle really be that benevolence and kindness are not proper motives to induce a creditor himself to give up and

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to bind the other creditors to give up a portion of the assets which might otherwise be distributed amongst all the creditors, it would follow that if one creditor, necessary to make up the statutory majority, were influenced by such motives, there would be an absence of a sufficient number, and the whole deed would be invalid. I cannot myself think that the legislature intended that result. I think it is probable it would be found on examination that the decision of the Lords Justices does not involve any such proposition; and if that is so, I think that it is impossible to distinguish the question raised by this replication from the point which was decided by the Lords Justices.

HAYES, J. I am quite of the same opinion. On an equitable question a decision by the judges of a court of equity is hardly to be reviewed here; and the question should be submitted to the court of error and argued there.

Judgment for defendant, on demurrers to the pleas, and to the 3rd, 4th, and 5th replications; and for plaintiffs, on demurrers to the 6th, 7th, and 8th replications. (1)

Attorney for plaintiffs: *Jacob Michael.*
Attorneys for defendant: *G. S. & H. Brandon.*

(1) *Ex parte Cowen* (Law Rep. 2 Ch. App. 563) was discussed in *Ex parte Deacon*, before Page Wood and Selwyn, L.JJ. (Law Rep. 4 Ch. App. 87.)

Referred to. PERERA v. PEIRIS. [1949] A. C. 1

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Nov. 25.

Libel—Privileged Publication—Report of Debate in Parliament—Comments on Matters of public Concern.

A faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question. But the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, viz., that the advantage of publicity to the community at large outweighs any private injury resulting from the publication.

The plaintiff presented a petition to the House of Lords, charging a high judicial officer with having, thirty years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons, and praying inquiry and the removal of the officer if the charge was found true; a debate ensued on the presentation of the petition, and the charge was utterly refuted:—

Held, that this was a subject of great public concern on which a writer in a public newspaper had full right to comment, and the occasion was therefore so far privileged that the comments would not be actionable so long as a jury should think them honest and made in a fair spirit, and such as were justified by the circumstances as disclosed in an accurate report of the debate.

FIRST count, that Earl Russell had, at the request of the plaintiff, presented to the House of Lords a petition of the plaintiff wherein he prayed that a committee of the House might be appointed to investigate certain charges made by the plaintiff against Sir Fitzroy Kelly, and thereupon the defendant falsely and maliciously printed and published in the *Times* newspaper, in the form of a debate in the House of Lords, the words following:—

The count then set out verbatim the report which was given at very considerable length in the *Times* of the 13th of February, 1867, of a debate in the House of Lords on the previous evening. The following is the substance of the report:—Earl Russell presented a petition from Mr. Wason (the plaintiff), stating (inter alia), that Sir Fitzroy Kelly, lately appointed Lord Chief Baron, did in the year 1835, when a barrister, pledge his honour as a gentleman to the truth of that which he knew to be false, for the purpose of deceiving an election committee of the House of Commons, and praying the appointment of a committee to investigate the charges, and if the committee should find them proved, that the House would concur with the other house of parliament

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in praying the Queen that Sir Fitzroy Kelly might be relieved from his judicial position. Earl Russell stated that he should not ask the House to assent to the prayer of the petition, as he did not concur in it; Mr. Wason had sent him (Earl Russell) copies of letters he had written to Lord Derby, the prime minister, and Mr. Walpole, home secretary, in which he specified that the false statement with which he charged Sir F. Kelly was, that "he, Mr. Kelly, was not acquainted personally with a Mr. Pilgrim," whereas Sir F. Kelly denied ever having made such a statement, as he knew Pilgrim very well as a clerk in a solicitor's office, and the shorthand notes of Mr. Kelly's speech to the committee contained no such statement or anything like it. "It therefore appears to me," said Earl Russell, "that Mr. Wason's statement must be regarded as a fabrication." The Lord Chancellor (Lord Chelmsford) then went more in detail into the charges, and gave the same refutation of them, in stronger language, concluding "this petition will now lie on the table a perpetual record of his (the plaintiff's) falsehood and malignity." The Earl of Derby said that he thought, after the debate and refutation, "We shall only be doing our duty and supporting our own dignity and character by refusing to allow so slanderous, calumnious, and unfounded a statement to lie on the table."

The second count charged as a libel and set out verbatim the leading article in the same issue of the *Times* upon the above debate; the article, after giving the facts and setting out the petition, proceeded:—"This was the petition which Lord Russell thought fit to present to the House of Lords last evening, and in a subsequent speech, after the futility and malignity of its charges had been exposed by the Lord Chancellor, he defended the course he had adopted . . . but having satisfied himself that the allegations of the petition were untrue, he would not support its prayer or found any motion on its terms. . . . . No man, whatever his position, is bound to make himself the instrument for the circulation of calumnies. . . . Yet, believing the charges to be false, Lord Russell takes charge of the petition."

Plea: Not guilty.

At the trial before Cockburn, C.J., at the sittings in London after Michaelmas Term, 1867, the publication having been proved,

the plaintiff was examined and admitted that he was mistaken in making the particular charge of falsehood against Sir F. Kelly, specified in the letter to Lord Derby. On behalf of the defendant, who was admitted to be a proprietor of the *Times*, it was proved that the libel charged in the first count was an accurate report of the debate.

The Lord Chief Justice told the jury, that if they were satisfied that the matter charged as a libel in the first count was a faithful and correct report of the proceedings in the House of Lords, and of the speeches delivered on the occasion, he directed them in point of law that it was a privileged publication, and one which was not the subject of a civil action, and they should find for the defendant on that count.

As to the second count, the Chief Justice said, that the matter of the debate, viz., a charge against a high judicial officer was a matter of the deepest public concern, upon which a writer in a public newspaper was perfectly justified in making such comments as the circumstances, as disclosed in the report of the debate, warranted, and which a jury should be of opinion were fair and reasonable with reference to the subject matter of the discussion; and the question for them was, whether this privilege had been honestly and fairly exercised, and if they thought there had been no excess beyond what the occasion justified, they would find for the defendant.

The jury found on both counts for the defendant.

A rule was afterwards obtained for a new trial, for misdirection: First, that the Chief Justice directed the jury that the publication of the libel charged in the first count was privileged, if they should find it to be a true and faithful report of the debate in the House of Lords, and that they should therefore find for the defendant. Secondly, that the Chief Justice directed the jury to find for the defendant, if they thought that the comments contained in the libel charged in the second count on the conduct of the plaintiff in presenting the petition to the House of Lords, and on the debate in the House of Lords, were fair comments and within the limits of fair criticism.

Nov. 19. *Sir J. B. Karslake, Q.C. (A. G.), J. D. Coleridge, Q.C.,*

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and *C. W. Wood*, shewed cause. The first and principal question is, whether a faithful report in a newspaper of a debate in either house of parliament is primâ facie privileged, although it contains defamatory matter. All privilege implies necessarily that there has been falsehood and private injury. If the imputation were not injurious there would be no right of action, and if it were true it could be justified. Therefore, there is no necessity for privilege unless there be a libel, and a libel not legally justifiable on the ground of truth. Again, the principle on which the doctrine of privilege rests, is, that the public interest and advantage of publication in each particular case or class of cases outweighs the private and personal injury. It is deemed more advantageous for the community at large that particular individuals should be injured with impunity, than that men under the privileged circumstances should not be at full liberty to speak and publish what they believe to be true, although it may be defamatory on the character of individuals. There is no case to which this principle can apply with so much force as to the report of a parliamentary debate. It may be as well to observe that the debate in the present case was not a debate in which the name of the plaintiff was introduced involuntarily on his part, but it was a debate induced by the plaintiff himself in presenting his petition for inquiry as to the conduct of the Lord Chief Baron. There is no direct authority one way or the other, as to whether reports of parliamentary debates are privileged; but there are several cases in which the matter has come incidentally under consideration. Thus in *Rex* v. *Wright* (1) the Court refused a criminal information against a bookseller for publishing a report of the House of Commons, containing a libel on Horne Tooke; and Lord Kenyon, C.J., held that a report of the House of Commons could not be made the subject of a libel; Lawrence, J., citing *Curry* v. *Walter* (2), puts the case of a report of proceedings in parliament on the same footing as the report of proceedings in a court of justice, viz., that the general advantage to the public of having these proceedings made public more than counterbalances the inconveniences to the private persons whose conduct may be impugned. *Rex* v. *Creevey* (3) is no authority to the contrary; there a member of parliament was convicted

(1) 8 T. R. 293. (2) 1 B. & P. 525. (3) 1 M. & S. 273.

of libel for publishing a speech he had made in the house; but the report was only of a single speech, and it is just like the case of publishing part only of the proceedings in a court of justice, such as the speech of counsel; and Lord Ellenborough, C.J., expressly distinguishes the case on the ground that a single speech could not be said to be a proceeding in parliament; and Bayley and Le Blanc, JJ., both proceeded on the ground that the occasion did not justify the publication, the publication being of a single speech. The cases of *Lake* v. *King* (1) and *Rex* v. *Lord Abingdon* (2), were referred to in that case; in the first the publication of a scandalous petition to the House of Commons was held not libellous, as being in the course of parliament; while in the latter the publication of a single speech made in parliament was held libellous. The case of *Stockdale* v. *Hansard* (3) will be relied on by the plaintiff; but although there are dicta of some of the puisne judges in favour of the doctrine that the report of a debate in either house of parliament would not be and ought not to be privileged, yet the decision is really only that the House of Commons could not mero motu legalize the publication of a libel by ordering the printing and publication of a report made to the House; this was the decision on the demurrer, and the substance and effect of Lord Denman, C.J.'s direction to the jury on the trial were the same. (4) In *Davison* v. *Duncan* (5) the Court were unanimous that the privilege accorded to the report of proceedings in a court of justice did not extend to the report of what was said at a public meeting; but Wightman, J., seemed to think that it did extend to the report of proceedings in parliament; and he drew the distinction between such a report and the publication of a single speech. Mr. Starkie (on Libel, vol. i. 261, 2nd ed.) no doubt takes the contrary view, but he bases the distinction between the report of legal and parliamentary proceedings on the narrow ground that courts of justice are open to the public, whereas the publication of parliamentary proceedings is, theoretically at least, a breach of privilege.

On the second count, taking into consideration the false position

(1) 1 Saund. 131.
(2) 1 Esp. 226.
(3) 9 Ad. & E. 1.
(4) 2 Mood. & Rob. at p. 12; 7 C. & P. at p. 738.
(5) 7 E. & B. 229; 26 L. J. (Q.B.) 104.

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in which the plaintiff had put himself by making charges which were proved to be utterly groundless, and inasmuch as the matter was one of public interest, a writer in a public newspaper had a right to comment on the matter, and the comments were no stronger than the occasion fairly justified: *Campbell* v. *Spottiswoode* (1), *Turnbull* v. *Bird* (2), *Paris* v. *Levy* (3), *Lewis* v. *Levy*. (4)

Nov. 19, 21. *T. Jones, Q.C.*, and *R. E. Turner*, in support of the rule. As to the first count, *Stockdale* v. *Hansard* (5) is a direct authority that a report of parliamentary proceedings is not privileged. That was an à fortiori case, for the House of Commons had ordered the papers to be published, as being for the public advantage, and yet the Court decided against the defendant, and held the publication libellous, expressly deciding that the detriment to the individual was sufficient to override the public advantage; and not only did the Court so decide, but several members of it expressed opinions adverse to the supposed advantage of giving immunity to the publication of parliamentary proceedings. [They then referred at length to the judgments of Littledale, Patteson, and Coleridge, JJ. (6)]

[COCKBURN, C.J. The point decided in that case was, not that the reports of parliamentary debates were not privileged, nor even that a report of a committee of the House would not be privileged, but that the House of Commons, by ordering a report of inspectors of prisons to be printed, could not legalize the publication of libellous matter.]

But all the learned judges, including Lord Denman, C.J. (7), assume throughout as the basis of their decision that the publication of parliamentary proceedings is not privileged. *Lake* v. *King* (8) decided that the printing and publication was justifiable only so far as publication to the members themselves, but no further. *Rex* v. *Wright* (9) is strongly commented upon by Lord

(1) 3 B. & S. 769; 32 L. J. (Q.B.) 185.
(2) 2 F. & F. 508.
(3) 9 C. B. (N.S.) 342; 30 L. J. (C.P.) 11.
(4) E. B. & E. 537, 560, 561; 27 L. J. (Q.B.) 282, 290.
(5) 9 Ad. & E. 1.
(6) 9 Ad. & E; see especially, pp. 181, 182; 211—213; 241, 242.
(7) 9 Ad. & E. at p. 114.
(8) 1 Saund. 131.
(9) 8 T. R. 293.

Ellenborough, C.J., in *Rex* v. *Creevey* (1), and, while doubting the propriety of the decision, he points out that it is no authority to warrant the publication of parliamentary proceedings such as a speech or debate; and *Rex* v. *Creevey* (2) is an express decision that a speech delivered in parliament cannot be published with impunity if libellous. The publication of a libellous speech was held not privileged by Lord Kenyon himself in *Rex* v. *Lord Abingdon*. (3) In *Davison* v. *Duncan* (4) all the Court agreed that a report, though fair and accurate, of what was said at a public meeting, was not privileged; and Wightman, J., contrasted the case with the privilege as to the publication of judicial proceedings; and added, "So it may be in the case of parliamentary proceedings. But when a member of parliament volunteered to publish a corrected edition of his speech, it was held in *Rex* v. *Creevey* (1) not to be privileged; so that even the privilege of making a report of what took place in parliament is limited;" on which Lord Campbell, C.J., observes, after referring to *Rex* v. *Creevey* (1) and *Rex* v. *Lord Abingdon* (3) that he "should think a publication of a report of his speech by a member of the House of Commons bonâ fide addressed to his constituents would be privileged;" but Crompton, J., puts this on its true ground: "The privilege in such a case would arise because the publication was as a communication between a member and his constituents, and not because it was a true report of what took place in parliament." There is in fact no authority at all for the proposition that the report of a debate in either house is privileged, and there is direct authority that the report of a speech is not privileged. If we look at the statutes, we find legislative declaration against the existence of this supposed privilege. Thus, 3 Vict. c. 9, passed in consequence of the decision in *Stockdale* v. *Hansard* (5) makes lawful the publication of all papers, reports, or proceedings ordered by either house to be printed; but it does not extend the privilege to reports of debates. And what was the opinion as to the law on this point held by the highest legal authorities, is shown by the debates which subsequently took place. Thus in 1843, when Lord Campbell introduced into the House of Lords his bill as

(1) 1 M. & S. 273, 277, 278. (2) 1 M. & S. 273. (3) 1 Esp. 226.
(4) 7 E. & B. 229; 26 L. J. (Q.B.) 104. (5) 9 Ad. & E. 1.

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to libel, which now stands in the statute book as 6 & 7 Vict. c. 96, on clause 7 being discussed, by which it was proposed to enact that no legal proceeding, civil or criminal, should be maintainable for a faithful report of any proceedings in either house of parliament at which strangers had been permitted to be present, both Lord Campbell, while supporting the clause, and Lord Brougham, who opposed it, shewed clearly that they thought the publication of a report of parliamentary proceedings was not privileged. [They then read several passages from the debate. (1)]

(1) Hansard's Parliamentary Debates, 3rd series, vol. lxx., pp. 1254—1258. House of Lords, July 18, 1843. Lord Campbell proposed clause 7; the clause, he stated, was founded on the 10th proposition of the recommendations of the committee on the law of libel, which ran thus:—"That no action, indictment, or information shall be maintainable for a faithful report of any proceedings of courts of justice, or before magistrates acting in the discharge of their duty, or of any proceedings in either house of parliament, at which strangers have been permitted to be present, provided that such proceedings are not of such a nature that a report thereof would be contrary to good manners."

After some preliminary observations, Lord Campbell continued: "Faithful and bonâ fide reports of parliamentary proceedings, why ought not they to be as much protected as similar reports of legal proceedings?" . . . . He proposed, then, to assimilate the law in respect of parliamentary proceedings generally, to the law as regarded legal proceedings. This would not sanction unfair and unfaithful reports, but only those that were fair and faithful." . . .

Lord Brougham "was decidedly of opinion that parliament could not discharge its higher functions without the most entire freedom of debate. In proportion, however, as there should be an absolute and unrestrained privilege within the walls of parliament for saying whatever any member might think proper to say, restrained only by his sense of duty, so in the same proportion, was the necessity absolute that there should not be given an unrestrained power to the press to publish everything that was said in parliament. There was no fear of the proceedings of parliament not being published. Practically, therefore, there was no necessity for such provision as this. In the course of all his experience at the bar, he never remembered a single prosecution or action for the publication of a speech delivered in parliament. In the case of Wright, publisher, reported in 6 Term Reports, an action was brought by Horne Tooke against Wright for publishing a report of proceedings in parliament which reflected upon Mr. Horne Tooke. The Court of King's Bench held that it was a privileged publication, because it was good for parliament itself and for the country that the publication should be made. But the Court never held, on the contrary the rule was the other way, that any indemnity whatever should be given to the publisher for printing everything that was said in parliament. It was the only check upon members of parliament that the publication should rest on the responsibility of the publisher." . . .

The clause was negatived by 11 to 5.

Again, in 1858, when in consequence of the decision in *Davison* v. *Duncan* (1), Lord Campbell introduced another bill into the House of Lords to protect fair reports of certain public meetings, he also included in the proposed protection faithful reports of parliamentary debates at which strangers had been permitted to be present; and he and Lord Cranworth, who supported, and Lords Lyndhurst, Wensleydale, and Chelmsford, C., who opposed it, never for a moment doubted that without the protection of an act of parliament the publication of parliamentary debates containing libellous matter was actionable. (2) That there was not and ought not to be such a privilege accorded to the promiscuous publication of all that passes in the houses of parliament, is thus shewn by the opinion of those best qualified to form an opinion. And in addition it may be noticed that when Mr. Creevey, in 1813, brought forward his conviction as a breach of privilege, and sought to raise a debate upon it, Mr. Williams Wynn, in opposing, cited as the highest authority he could cite the statement of Mr. Fox made in 1788, against the existence of such a privilege. (3) The analogy between the reports of legal proceedings and of proceedings in parliament cannot be supported. In the first place the ground upon which the publication of proceedings in a court of justice is often supported, as by Patteson, J., in *Stockdale* v. *Hansard* (4), is that the courts are themselves open to the public, whereas it is only by a tacit abrogation of the standing orders that strangers are permitted to be present at the debates in either house. Secondly, it may well be that the public are interested in what passes in a court of justice; every one is interested in the due administration of justice which the publicity of reports tends to foster: but it by

(1) 7 E. & B. 229; 26 L. J. (Q.B.) 104.

(2) See Hansard's Parliamentary Debates, 3rd series, vol. cxlix., pp. 947—982.

(3) "He did not hold the opinion, that because members in the house may not only with propriety, but with strict regard to their duty, hold certain language and declare certain sentiments upon any topic under their consideration, the public prints were warranted in giving these to the world at large. The freedom of speech he considered as the first and most essential privilege of parliament, inseparable from its dignity and well being; and he could easily imagine many cases *in which it would be a gross libel and breach of privilege in a newspaper to publish such words as he would find it necessary to make use of in his place.*" Parliamentary Debates, 1st series, vol. xxvi., p. 914.

(4) 9 Ad. & E. at p. 212.

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no means follows that the public are necessarily interested in proceedings in parliament.

[HANNEN, J. If the question is to be argued on the ground of expediency, surely the argument is à fortiori in favour of the publication of proceedings in parliament. What, it may be said, is the interest the public have in a dispute between two private individuals, compared with the interest they must all have in what passes in parliament?]

As to the second count: the article was not justified by the occasion. The writer assumes throughout that the charge contained in the plaintiff's petition was proved to be false; and that the charge in the petition against Sir F. Kelly was that stated in the plaintiff's letter to Lord Derby: this the plaintiff distinctly negatived at the trial.

[COCKBURN, C.J. The article proceeded on the footing of the debate, and the Lord Chancellor assumed the charge to be that contained in the plaintiff's letter to Lord Derby, and then proceeded to shew that it was false; and, surely, when a petition is presented, making a charge in general terms thirty years after the occurrence, and a letter making a specific charge is written to the head of the government within three weeks of the presenting of the petition, it was but natural to make the assumption the Lord Chancellor did: and how could the writer do otherwise?

LUSH, J. The question was for the jury; it is impossible to say that the Chief Justice ought to have withdrawn the case from the jury; and the rule was not moved as against evidence.]

Cur. adv. vult.

Nov. 25. The judgment of the Court was delivered by

COCKBURN, C.J. This case was argued a few days since before my Brothers Lush, Hannen, and Hayes, and myself, and we took time, not to consider what our judgment should be, for as to that our minds were made up at the close of the argument, but because, owing to the importance and novelty of the point involved, we thought it desirable that our judgment should be reduced to writing before it was delivered.

The main question for our decision is, whether a faithful report in a public newspaper of a debate in either house of parliament,

containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of direct authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of *Rex* v. *Wright* (1), Lawrence, J., placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate unauthorized by the House. Again in *Davison* v. *Duncan* (2), Wightman, J., seems disposed to treat the reports of proceedings in parliament as entitled to the same privilege as reports of proceedings in courts of justice. But here again the question before the Court had reference to a report, not of a proceeding in parliament, but of proceedings at a public meeting of improvement commissioners of a particular locality, in which the conduct of an individual had been assailed, and which report the Court held not to be privileged, without being in any way called upon to determine how far the privilege would have extended to a report of proceedings in parliament. On the other hand, in *Stockdale* v. *Hansard* (3), Littledale, J., and Patteson, J., use language from

(1) 8 T. R. 293.

(2) 7 E. & B. 229, 232; 26 L. J. (Q.B.) 104, 107.

(3) 9 Ad. & E. 181—186; 212—214.

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which it may be safely inferred that they would have deemed the report of a parliamentary debate, if containing an attack on character, as not entitled to be held privileged in an action for libel. But here again the question was not how far the publication of parliamentary debates was privileged, but solely whether an order of the House of Commons directing a paper, forming no part of the proceedings of the House, and containing libellous matter, to be printed and sold to the public, and a resolution of the House that such an order was within its privileges, protected the publisher of the paper from an action of libel. Any opinion expressed on the subject of the report of parliamentary debates was therefore beyond the scope of the inquiry, and must be considered as more or less extrajudicial.

Several cases were cited in the course of the argument before us, but they turned for the most part on the question of parliamentary privilege, and therefore appear to us very wide of the present question. The case of *Rex* v. *Wright* (1) approaches nearest to the one before us. In that case a committee of the House of Commons having made a report imputing to Horne Tooke seditious and revolutionary designs after his acquittal on a trial for high treason, and the House having ordered the report to be printed for the use of its members, the defendant, a bookseller and publisher, printed and published copies of the report. On an application for a criminal information the Court refused the rule, apparently on the ground that the report of a committee of the House of Commons, approved of by the House, being part of the proceedings of parliament, could not possibly be libellous. Lord Kenyon, C.J., says, "This report was first made by a committee of the House of Commons, then approved by the House at large, and then communicated to the other House, and it is now sub judice; and yet it is said that this is a libel on the prosecutor. It is impossible for us to admit that the proceeding of either of the houses of parliament is a libel; and yet that is to be taken as the foundation of this application." (2) Lord Kenyon and his colleagues appear to have thought that a paper, though containing matter reflecting on the character of an individual, if it formed part of the proceedings of the House of Commons, would be so divested of all libellous character as that

(1) 8 T. R. 293. (2) 8 T. R. at p. 296.

a party publishing it, even without the authority of the House, would not be responsible at law for the defamatory matter it contained. If this doctrine could be upheld, it would have a manifest bearing on the present question, for as no speech made by a member of either house, however strongly it may assail the conduct or character of others, can be held to be libellous, it would follow, such a speech being a parliamentary proceeding, that the publication of it would not be actionable. But this is directly contrary to the decision in *Rex* v. *Lord Abingdon* (1), and *Rex* v. *Creevey* (2), in which the publication of speeches made in parliament reflecting on the character of individuals was held to be actionable. And it must be admitted that the authority of the case of *Rex* v. *Wright* (3) is much shaken, not only by the decision in *Rex* v. *Creevey* (2), but also by the observations made by Lord Ellenborough in his judgment in the latter case.

Beyond, however, impugning the authority of *Rex* v. *Wright* (3), the two last-mentioned cases afford little assistance towards the solution of the present question. There is obviously a very material difference between the publication of a speech made in parliament for the express purpose of attacking the conduct or character of a person, and afterwards published with a like purpose or effect, and the faithful publication of parliamentary debates in their entirety, with a view to afford information to the public, and with a total absence of hostile intention or malicious motive towards any one.

The case of *Lake* v. *King* (4), which was cited in the argument before us, has no application to the present case. There, a petition having been presented to the House of Commons by the defendant, impugning the conduct of the plaintiff, copies of the petition had been printed and circulated among the members of the house, and it was held that, the printing and circulating petitions being according to the course and usage of parliament, no action would lie.

The case of *Stockdale* v. *Hansard* (5), which was much pressed upon us by the counsel for the defendant, is in like manner beside the question. In that case a report from the inspectors of prisons relative to the gaol of Newgate, in which a work published by the

(1) 1 Esp. 226.
(2) 1 M. & S. 273.
(3) 8 T. R. 293.
(4) 1 Saund. 131.
(5) 9 Ad. & E. 1.

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plaintiff, a bookseller, and which had been permitted to be introduced into the prison, had been described as "of a most disgusting nature," and as containing "plates obscene and indecent in the extreme," had been presented to the house in conformity with the act of 5 & 6 Wm. 4, c. 38. In another report, being a reply to a report of the court of aldermen on the same subject, the inspectors had reiterated their charges as to the character of the book, adding that it had been described by medical booksellers, to whom they (the inspectors) had applied for information as to its character, as "one of Stockdale's obscene books." These papers the House had ordered to be printed, not only for the use of members, but also, in conformity with a modern practice, for public sale, the proceeds to be applied to the general expenses of printing by the House. An action of libel having been brought by Stockdale against the defendants, the printers of the House of Commons, for publishing these papers, the defence as raised by the plea which this Court had to consider was, first, that the papers in question had been published by order of the House of Commons; secondly, that the House having resolved (as it had done with a view to such an action) that the power of publishing such of its reports, votes, and proceedings, as it should deem necessary, was an essential incident to the functions of parliament, the question became one of privilege, as to which the decision of the House was conclusive, and could not be questioned in a court of law.

From the doctrines involved in this defence, namely, that the House of Commons could by their order authorize the violation of private rights, and, by declaring the power thus exercised to be matter of privilege, preclude a court of law from inquiring into the existence of the privilege,—doctrines which would have placed the rights and liberties of the subject at the mercy of a single branch of the legislature,—Lord Denman and his colleagues, in a series of masterly judgments which will secure to the judges who pronounced them admiration and reverence so long as the law of England and a regard for the rights and liberties of the subject shall endure, vindicated at once the majesty of the law and the rights which it is the purpose of the law to uphold.

To the decision of this Court in that memorable case we give our unhesitating and unqualified adhesion. But the decision in that

case has no application to the present. The position, that an order of the House of Commons cannot render lawful that which is contrary to law, still less that a resolution of the House can supersede the jurisdiction of a court of law by clothing an unwarranted exercise of power with the garb of privilege, can have no application where the question is, not whether the act complained of, being unlawful at law, is rendered lawful by the order of the House or protected by the assertion of its privilege, but whether it is, independently of such order or assertion of privilege, in itself privileged and lawful.

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible.

The immunity thus afforded in respect of the publication of the proceedings of courts of justice rests upon a twofold ground. In the English law of libel, malice is said to be the gist of an action for defamation. And though it is true that by malice, as necessary to give a cause of action in respect of a defamatory statement, legal, and not actual malice, is meant, while by legal malice, as explained by Bayley, J., in *Bromage* v. *Prosser* (1), is meant no more than the wrongful intention which the law always presumes as accompanying a wrongful act without any proof of malice in fact, yet the presumption of law may be rebutted by the circumstances under which the defamatory matter has been uttered or published, and, if this should be the case, though the character of the party concerned may have suffered, no right of action will arise. "The rule," says Lord Campbell, C.J., in the case of *Taylor* v. *Hawkins* (2), "is that, if the occasion be such as repels the presumption of malice, the communication is privileged, and the plaintiff must then, if he can, give evidence of malice."

(1) 4 B. & C. at p. 255.
(2) 16 Q.B. at p. 321; 20 L. J. (Q.B.) at p. 314.

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It is thus that in the case of reports of proceedings of courts of justice, though individuals may occasionally suffer from them, yet, as they are published without any reference to the individuals concerned, but solely to afford information to the public and for the benefit of society, the presumption of malice is rebutted, and such publications are held to be privileged.

The other and the broader principle on which this exception to the general law of libel is founded is, that the advantage to the community from publicity being given to the proceedings of courts of justice is so great, that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in parliament from that of proceedings of courts of justice, it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J. in *Rex* v. *Wright* (1), namely, that "though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience to the private persons whose conduct may be the subject of such proceedings." In *Davison* v. *Duncan* (2), Lord Campbell says, "A fair account of what takes place in a court of justice is privileged. The reason is, that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Wightman, J., says:—"The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great."

(1) 8 T. R. at p. 298. (2) 7 E. & B. at p. 231; 26 L. J. (Q.B.) at p. 106.

3 Jur. N.S. 614

Both the principles, on which the exemption from legal consequences is thus extended to the publication of the proceedings of courts of justice, appear to us to be applicable to the case before us. The presumption of malice is negatived in the one case as in the other by the fact that the publication has in view the instruction and advantage of the public, and has no particular reference to the party concerned. There is also in the one case as in the other a preponderance of general good over partial and occasional evil. We entirely concur with Lawrence, J., in *Rex* v. *Wright* (1), that the same reasons which apply to the reports of the proceedings in courts of justice apply also to proceedings in parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. Where would be our confidence in the government of the country or in the legislature by which our laws are framed, and to whose charge the great interests of the country are committed,—where would be our attachment to the constitution under which we live,—if the proceedings of the great council of the realm were shrouded in secresy and concealed from the knowledge of the nation? How could the communications between the representatives of the people and their constituents, which are so essential to the working of the representative system, be usefully carried on, if the constituencies were kept in ignorance of what their representatives are doing? What would become of the right of petitioning on all measures pending in parliament, the undoubted right of the subject, if the people are to be kept in ignorance of what is passing in either house? Can any man bring himself to doubt that the publicity given in modern times to what passes in parliament is essential to the maintenance of the relations subsisting between the government, the legislature, and the country at large? It may, no doubt, be said that, while it may be necessary as a matter of national interest that the proceedings of parliament should in general be made public, yet that debates in which the character of individuals is brought into question ought to be suppressed. But to this, in

(1) 8 T. R. at p. 298.

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addition to the difficulty in which parties publishing parliamentary reports would be placed, if this distinction were to be enforced and every debate had to be critically scanned to see whether it contained defamatory matter, it may be further answered that there is perhaps no subject in which the public have a deeper interest than in all that relates to the conduct of public servants of the state,—no subject of parliamentary discussion which more requires to be made known than an inquiry relating to it. Of this no better illustration could possibly be given than is afforded by the case before us. A distinguished counsel, whose qualification for the judicial bench had been abundantly tested by a long career of forensic eminence, is promoted to a high judicial office, and the profession and the public are satisfied that in a most important post the services of a most competent and valuable public servant have been secured. An individual comes forward and calls upon the House of Lords to take measures for removing the judge, in all other respects so well qualified for his office, by reason that on an important occasion he had exhibited so total a disregard of truth as to render him unfit to fill an office for which a sense of the solemn obligations of truth and honour is an essential qualification. Can it be said that such a subject is not one in which the public has a deep interest, and as to which it ought not to be informed of what passes in debate? Lastly, what greater anomaly or more flagrant injustice could present itself than that, while from a sense of the importance of giving publicity to their proceedings, the houses of parliament not only sanction the reporting of their debates, but also take measures for giving facility to those who report them, while every member of the educated portion of the community from the highest to the lowest looks with eager interest to the debates of either house, and considers it a part of the duty of the public journals to furnish an account of what passes there, we were to hold that a party publishing a parliamentary debate is to be held liable to legal proceedings because the conduct of a particular individual may happen to be called in question?

The learned counsel for the plaintiff scarcely ventured as of his own assertion to deny that the benefit to the public from having the debates in parliament published was as great as that which arose from the publishing of the proceedings of courts of justice, but

he relied on the dicta of Littledale, J., and Patteson, J., in *Stockdale* v. *Hansard* (1), and on the opinions of certain noble and learned lords in the course of debates in the House of Lords on bills introduced by Lord Campbell for the purpose of amending the law of libel. (2) There is no doubt that in delivering their opinions in *Stockdale* v. *Hansard* (1), the two learned judges referred to denied the necessity and in effect the public advantage of the proceedings in parliament being made public. The counsel for the defendant in that case having insisted, as a reason why the power to order papers to be printed and published should be considered within the privileges of the House of Commons, on the advantage which resulted from the proceedings of parliament being made known, the two learned judges, not satisfied with demonstrating, as they did, by conclusive arguments, that the House had not the power to order papers of a libellous character and forming no part of the proceedings of the House to be published, still less to conclude the legality of such a proceeding by the assertion of privilege, thought it necessary to follow the counsel into the question of policy and convenience, and in so doing took what we cannot but think a very shortsighted view of the subject. This is the more to be regretted, as their observations apply not only to the printing of papers by order of the House, the only question before them, but also to the publication of parliamentary proceedings in general, the consideration of which was not before them, and therefore was unnecessary. Lord Denman, in his admirable judgment, than which a finer never was delivered within these walls, and in which the spirit of Holt is combined with the luminous reasoning of a Mansfield, while overthrowing by irresistible arguments the positions of the Attorney General, was content to answer the argument as to the policy of allowing papers to be published by order of either of the houses of parliament, not by denying the policy of giving power to the House to order the printing and publishing of papers, but by saying that such power must be provided for by legislation. On the subject of the publication of parliamentary debates he said nothing, nor was he called upon to say anything.

(1) 9 Ad. & E. 1.

(2) In 1843: see Hansard's Parliamentary Debates, 3rd series, vol. lxx., pp. 1254—8; and in 1858, see vol. cxlix., pp. 947—82.

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That the legislature did not concur with the two judges in their view of the policy is manifest from the Act of 3 Vict. c. 9, passed in consequence of the decision in *Stockdale* v. *Hansard* (1), the preamble of which statute recites that "it is essential to the due and effectual exercise and discharge of the functions and duties of parliament and to the promotion of wise legislation that no obstructions or impediments should exist to the publication of such of the reports, papers, votes, or proceedings of either house of parliament as such house of parliament may deem fit or necessary to be published." After which the Act proceeds to provide for the prevention of actions being brought in respect of papers published by order of either house of parliament.

As regards the attempt of Lord Campbell to fix the legality of the publication of parliamentary debates on the sure foundation of statutory enactment (2), we think it may be as well accounted for by the apprehension, as to the result of any proceeding at law in which the legality of such publication should come in question, produced in his mind by the language of the judges in *Stockdale* v. *Hansard* (1), as by any conviction of the defectiveness of the law. And as regards the opinions of the noble and learned persons in the debates in the House of Lords, we must observe that the discussion proceeded on the assumption that the publishing of parliamentary debates, if involving defamatory matter, was contrary to law, and actionable, although no decision to that effect had ever been pronounced, and no argument or discussion on the point had ever taken place. We, before whom this question is now presented for judicial decision for the first time, and who have had the advantage of able and learned arguments at the bar to assist us, must endeavour to ascertain the law as applicable to the case, and, if our minds are satisfied as to what the law is, must decide according to our convictions, undeterred by the authority of great names or the opinions of those who, although our superiors in all other respects, had not the advantage of forensic discussion, or the opportunity of a judicial consideration of the subject. And this is the more necessary, as we observe that one of the main grounds insisted on for resisting Lord Campbell's bill was, that there was no necessity for

(1) 9 Ad. & E. 1.

(2) See Hansard's Parliamentary Debates, 3rd series, vol. lxx., p. 1254; and vol. cxlix., p. 947.

legislation, inasmuch as no action had ever been brought in respect of the publication of a parliamentary debate. We cannot but think that,—had the noble and learned persons referred to forescen that such an action as the present would be brought, in which a party, having by his own attack upon a public man given rise to a debate in one of the houses of parliament which he knew would, in the ordinary course of things, be reported, charges as a libel the publication of the discussion which he himself has provoked, and which publication he would have hailed with satisfaction if the result of it had been favourable to himself and damaging to the object of his attack,—they would have paused before they assumed that by law such an action could be maintained, or at all events would have seen the necessity for an immediate amendment of a law so defective.

We, however, are glad to think that, on closer inquiry, the law turns out not to be as on some occasions it has been assumed to be. To us it seems clear that the principles on which the publication of reports of the proceedings of courts of justice have been held to be privileged apply to the reports of parliamentary proceedings. The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motives of public men has only in very recent times

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been recognized. Comments on government, on ministers and officers of state, on members of both houses of parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth. Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. Even in quite recent days judges, in holding publication of the proceedings of courts of justice lawful, have thought it necessary to distinguish what are called ex parte proceedings as a probable exception from the operation of the rule. Yet ex parte proceedings before magistrates, and even before this court, as, for instance, on applications for criminal informations, are published every day, but such a thing as an action or indictment founded on a report of such an ex parte proceeding is unheard of, and, if any such action or indictment should be brought, it would probably be held that the true criterion of the privilege is, not whether the report was or was not ex parte, but whether it was a fair and honest report of what had taken place, published simply with a view to the information of the public, and innocent of all intention to do injury to the reputation of the party affected.

1 C.P.D. 363.

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other: a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful,

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as was held in the cases of *Rex* v. *Lord Abingdon* (1), and *Rex* v. *Creevey*. (2) At the same time it may be as well to observe that we are disposed to agree with what was said in *Davison* v. *Duncan* (3), as to such a speech being privileged if bonâ fide published by a member for the information of his constituents. But whatever would deprive a report of the proceedings in a court of justice of immunity will equally apply to a report of proceedings in parliament.

It only remains to advert to an argument urged against the legality of the publication of parliamentary proceedings, namely, that such publication is illegal as being in contravention of the standing orders of both houses of parliament. The fact, no doubt, is, that each house of parliament does, by its standing orders, prohibit the publication of its debates. But, practically, each house not only permits, but also sanctions and encourages, the publication of its proceedings, and actually gives every facility to those who report them. Individual members correct their speeches for publication in Hansard or the public journals, and in every debate reports of former speeches contained therein are constantly referred to. Collectively, as well as individually, the members of both houses would deplore as a national misfortune the withholding their debates from the country at large. Practically speaking, therefore, it is idle to say that the publication of parliamentary proceedings is prohibited by parliament. The standing orders which prohibit it are obviously maintained only to give to each house the control over the publication of its proceedings, and the power of preventing or correcting any abuse of the facility afforded. Independently of the orders of the houses, there is nothing unlawful in publishing reports of parliamentary proceedings. Practically, such publication is sanctioned by parliament; it is essential to the working of our parliamentary system, and to the welfare of the nation. Any argument founded on its alleged illegality appears to us, therefore, entirely to fail. Should either house of parliament ever be so ill-advised as to prevent its proceedings from being made known to the country—which certainly never will be the case—any publication of its debates made in contravention of its orders would be a matter between the house and the publisher.

(1) 1 Esp. 226.
(2) 1 M. & S. 273.
(3) 7 E. & B. at p. 233; 26 L. J. (Q.B.) at p. 107.

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For the present purpose, we must treat such publication as in every respect lawful, and hold that, while honestly and faithfully carried on, those who publish them will be free from legal responsibility, though the character of individuals may incidentally be injuriously affected.

So much for the great question involved in this case. We pass on to the second branch of this rule, which has reference to alleged misdirection in respect of the second count of the declaration, which is founded on the article in the *Times* commenting on the debate in the House of Lords, and the conduct of the plaintiff in preferring the petition which gave rise to it. We are of opinion that the direction given to the jury was perfectly correct. The publication of the debate having been justifiable, the jury were properly told the subject was, for the reasons we have already adverted to, pre-eminently one of public interest, and therefore one on which public comment and observation might properly be made, and that consequently the occasion was privileged in the absence of malice. As to the latter, the jury were told that they must be satisfied that the article was an honest and fair comment on the facts,—in other words, that, in the first place, they must be satisfied that the comments had been made with an honest belief in their justice, but that this was not enough, inasmuch as such belief might originate in the blindness of party zeal, or in personal or political aversion; that a person taking upon himself publicly to criticise and to condemn the conduct or motives of another, must bring to the task, not only an honest sense of justice, but also a reasonable degree of judgment and moderation, so that the result may be what a jury shall deem, under the circumstances of the case, a fair and legitimate criticism on the conduct and motives of the party who is the object of censure.

Considering the direction thus given to have been perfectly correct, we are of opinion that in respect of the alleged misdirection as also on the former point, the ruling at nisi prius was right, and that consequently this rule must be discharged.

Rule discharged.

Attorneys for plaintiff: *J. & R. Gole.*
Attorney for defendant: *H. Dobie.*

THURLOW *v.* MACKESON.

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Nov. 26.

Mortgagor and Mortgagee—Power of Sale, how duly exercised.

D., a lessee for a long term of years, in 1848 mortgaged the premises to the defendant for the residue of the term minus five days, subject to a proviso for redemption, with a power, in case of default in payment of the principal sum and interest, to sell and dispose of the premises by public sale or private contract for such price as could reasonably be gotten for the same, the receipt of the defendant to be a full discharge to the purchaser. D. made default. On the 12th of May, 1852, there being then a larger sum due to defendant from D., the defendant contracted with P. to sell him the premises for 550*l.*, 50*l.* being paid down; and by indenture of the 15th of May, 1852, between defendant, a trustee, and P., reciting the above agreement, and that it had been agreed that 500*l.* of the purchase-money should remain on mortgage of the same premises, the defendant, in pursuance of the agreement, and in pursuance of the power in the mortgage of 1848, assigned to the trustee in trust for sale to pay the 500*l.* and interest, in case P. should make default, and P. covenanted to pay the purchase-money by yearly instalments of 100*l.* with interest. The defendant credited the whole of the 550*l.* to D.; P. entered and occupied the premises for some time, and having paid 200*l.* on account, made default. In 1859 the defendant and the trustee assigned the property to the plaintiff with a covenant against incumbrances. On the plaintiff attempting to raise money on the premises, it was objected that the power of sale in the original mortgage had not been duly exercised by the contract of sale carried out by the mortgage in 1852; on which the plaintiff sued the defendant on his covenant against incumbrances:—

Held, that as there was a valid and bonâ fide contract of sale between the defendant and P., the power of sale had been duly exercised, and it was immaterial that the contract of purchase was carried out by a mortgage.

SPECIAL case. (1)

6. By indenture of the 17th of October, 1848, made between Robert Chambers of the one part, and Henry Hart Davis of the other part, Chambers demised certain premises at Battersea to Davis for the term of 108 years from the 29th of September, 1848, subject to a yearly rent of 12*l.*

7. By indenture of the 18th of November, 1848, between Davis of the one part, and defendant of the other part, after reciting the above lease Davis, in consideration of 450*l.* paid to him by defendant, and in consideration that defendant had agreed to advance

(1) Paragraphs 1—5 contained the pleadings and particulars of incumbrances and special damage; the decision of the Court renders it unnecessary to set out more than is set out at the end of paragraph 23.

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to Davis the further sum of 100*l.*, bargained, sold, and demised the said lands comprised in the said lease to defendant for all the residue then unexpired of the said term except the last five days, subject to a proviso for redemption on payment of the principal moneys intended to be thereby secured and certain interest thereon. And it was by the said indenture further provided that "if default should be made in payment of the principal moneys intended to be thereby secured, or any part or parts thereof, or of the interest thereof, or of any part or parts thereof contrary to the covenant thereinbefore contained for payment of the same, then and in such case it shall be lawful for the defendant, his executors, administrators, or assigns, to sell and dispose of the said messuage or tenement, land, and premises, thereinbefore demised, or intended so to be, with their appurtenances for all the remainder of the said term thereby created, either together or in parcels, and either by public sale or by private contract, or partly by both, and as well before as after, and subject to any lease or letting which might have been granted or made of the premises respectively under the power thereinbefore contained for such price or prices as could reasonably be gotten for the same, and with, under, and subject to such conditions and stipulations as to title or otherwise as the defendant, his executors, administrators, or assigns might deem expedient, together with full power to buy in the same or any part or parts thereof respectively, and to abandon and vary the terms of any and every sale or agreement for or relating to the sale thereof, and to resell the premises so bought in or as to which the contract should have been so abandoned, or any part or parts thereof, at any future auction or by private contract, with like powers from time to time of buying in, abandoning, varying, and reselling of and in such manner as he or they should think advisable without being liable for any loss occasioned thereby, or to demise, lease, or let the several premises or any part or parts thereof for such term of years and in such manner as he or they should think proper, and also if they should think fit to receive and take the rents and profits of the said premises until sold, and also to make, give, and execute all acts, deeds, receipts, assignments, and assurances requisite for carrying every such sale, lease, or letting into execution, either with or without the concurrence of Davis, his executors,

administrators, and assigns. And it was thereby agreed and declared that the receipt or receipts in writing of the defendant, his executors, administrators, or assigns, for any money to arise from the said sale or sales, lease, or leases, or otherwise payable to him or them by virtue of those presents should effectually discharge the person or persons to whom the same should be given from being answerable or accountable for the misapplication or non-application, or from being in anywise bound to see to the application of the money therein respectively mentioned to be received, or from being bound or concerned to inquire into the necessity or propriety of any sale or sales, lease or leases, disposition or dispositions which might by made by virtue of those presents."

8. In the years 1848 and 1849, the defendant advanced to Davis sums making together the full further sum of 100*l.* agreed to be advanced by the defendant.

Davis made default in payment of the mortgage moneys and interest secured by the indenture of the 18th of November, 1848, and afterwards became bankrupt.

9. The defendant, on the 3rd of April, 1851, offered the property comprised in the mortgage for sale by public auction, but there were no bidders.

10. On the 12th of May, 1852, the defendant, by Edward Mackeson as his agent, entered into a contract with Henry Paine for the sale of the property for 550*l.* The contract was a memorandum written at the bottom of the particulars and conditions of sale advertised for the 20th of May, 1852, and was as follows:—

"Memorandum. I, Thomas Foulkes, as agent for Mr. Paine, of, &c., do hereby acknowledge myself to be purchaser of the property described in the within particulars of sale, at the sum of 550*l.*, and having paid 50*l.* as a deposit and in part payment of the purchase-money, I hereby bind myself, my heirs, executors, and administrators, to complete the purchase of the same agreeably to the within conditions of sale.

"Witness my hand this 12th day of May, 1852.

(Signed) "Thos. Foulkes,
Edward Mackeson."

11. At the date of this contract there was due to the defendant

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from Davis a larger sum than 550*l.* for principal, interest, and costs on his mortgage.

12. By indenture of the 15th of May, 1852, between the defendant of the first part, Edward Mackeson of the second part, and Henry Paine, of the third part, reciting, amongst other things, the indentures of the 17th of October, 1848, and the 18th of November, 1848; and that default had been made in the payment of the principal moneys and interest, and that the defendant, as mortgagee, and in pursuance of the power of sale in the indenture of the 18th of November, 1848, "contracted and agreed with and to the said Henry Paine for the absolute sale to him of the messuage or tenement, land, and premises mentioned in the said indenture, at or for the price of 550*l.* And that it had been agreed that the sum of 500*l.*, portion of the said purchase-money of 550*l.*, should remain on mortgage of the same premises, and should be secured as and in manner thereinafter mentioned." It was witnessed that in pursuance and performance of the said agreement, and in consideration of the sum of 50*l.* (portion of the said purchase money or sum of 550*l.*), paid by Paine to the defendant, and also in consideration of the covenant thereinafter contained for payment of the sum of 500*l.*, the residue of the purchase money or sum of 550*l.*, the defendant, in pursuance of the power or authority reposed in him by the said indenture of the 18th of November, 1848, as such mortgagee as aforesaid, and of every other power and authority in any wise enabling him in that behalf, did at the request of Paine testified, &c., bargain, sell, and assign unto Edward Mackeson, his executors, administrators, and assigns, all and singular, and such part and parts of the messuage or tenement, land, and premises comprised in the said lease of the 17th of October, 1848, as are comprised in and demised by the said indenture of the 18th of November, 1848, with the appurtenances, to hold the said messuage or tenement, land, and premises thereinbefore assigned or intended so to be, subject nevertheless to the rent, covenants, conditions, and agreements reserved and contained in the said indenture of the 17th day of October, 1848, but freed and discharged from all principal moneys and interest intended to be secured by the said indenture of the 18th of November, 1848, unto Edward Mackeson, his executors, administrators, and assigns, upon certain trusts for

sale in case Paine should make default in payment of the said sum of 500*l.* and interest. And it was thereby declared that Edward Mackeson should stand possessed of the proceeds of sale, upon trust, in the first place, to pay the costs of the sale, and, in the next place, to pay, retain, and satisfy the said sum of 500*l.* and interest; and, lastly, to pay or cause to be paid the residue of the said moneys unto Paine or other the person or persons for the time being entitled to the same, or as he or they should appoint. And it was thereby declared and agreed, that upon satisfaction of the trusts, the said Edward Mackeson should assign the said premises to Paine; and Paine thereby, amongst other things, covenanted for himself, his heirs, executors, and administrators, with and to the defendant, his heirs, executors, administrators, and assigns, that he, Paine, his executors, administrators, and assigns, should and would well and truly pay or cause to be paid unto the defendant, his executors, administrators, or assigns, the principal sum of 500*l.* and interest for the same after the rate of 5*l.* per cent. per annum in manner following (that is to say), 100*l.*, part of the said principal sum and interest, for the whole thereof, at the rate aforesaid, on the 15th day of May, 1853, and the like sum of 100*l.*, other part of the said principal sum, on the 15th day of May in each succeeding year, until the whole of the said principal sum should be paid, with interest at the rate aforesaid for so much of the said principal sum as should from time to time remain unpaid. And in default of payment it should be lawful for the said Edward Mackeson, at the request of the defendant, to sell and dispose of the said messuage or tenement and premises.

13. The draft of the indenture of the 15th of May, 1852, was perused by an independent solicitor on behalf of Paine, and he paid the 50*l.* mentioned in the deed. On the execution of the deed Paine was let into the possession of the premises, and he personally occupied them until some time after his bankruptcy hereinafter mentioned. During the time of his occupancy Paine paid the ground rent payable under the lease, and he also insured and repaired the premises. Paine paid the interest on the sum of 500*l.* referred to in the assignment to him, and paid 200*l.* on account of the principal. This sum of 200*l.* was paid as follows: May, 12, 1852, 50*l.*; June 20, 1853, 50*l.*; May 1, 1854, 100*l.*

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14. The defendant credited the whole sum of 550*l.* to Davis. As before stated, there was a much larger sum due to the defendant, and Davis was bankrupt. The estate paid no dividend, and there were no assets. The defendant did not prove against Davis's estate for the balance.

15. The defendant, on the 17th of July, 1854, advanced to Paine a further sum of 150*l.* on security of the property. On the occasion of this advance a deed was executed whereby Paine charged the premises with the payment of 150*l.* in addition to the 350*l.* due on the prior mortgage.

16. Paine made default in payment of the principal and interest secured by the indenture of the 7th of July, 1854, and afterwards became bankrupt.

17. In December the defendant agreed to sell the premises to Mr. Marshall for 425*l.*

18. By indenture of the 14th of December, 1859, between Edward Mackeson of the first part, the defendant of the second part, and Marshall of the third part, and which indenture was duly executed by all the parties thereto, after reciting (amongst other things) the said indentures of the 17th of October, 1848, the 18th of November, 1848, the 15th of May, 1852, and the 7th of July, 1854, Edward Mackeson, for the considerations therein mentioned, at the request of the defendant, assigned, and the defendant confirmed, unto Marshall the said premises comprised in and demised by the above-mentioned lease of the 17th of October, 1848, and assigned by the above-mentioned indenture of the 15th day of May, 1852, to hold to Marshall, his executors, administrators, and assigns, for the residue then to come of the said term of 108 years, except the last five days thereof, subject as therein mentioned; and thereby each of them, Edward Mackeson and the defendant, as to his own acts only, covenanted for himself, his heirs, executors, and administrators, with Marshall, his executors, administrators, and assigns, that they, the said Edward Mackeson and the defendant, or either of them, had not, nor had at any time or times, made, done, committed, or executed, or knowingly or willingly permitted or suffered, or been parties or privies, or party or privy, to any act, deed, matter, or thing whatsoever whereby, or by reason or means whereof, the said messuage or tenement, ground,

and premises, or any of them, or any part or parts thereof, were, was, could, should, or might be in anywise impeached, charged, incumbered, or otherwise prejudicially affected.

19. Marshall took possession of the premises pursuant to the last-mentioned deed, and, in or about September, 1863, agreed to sell them to the plaintiff for 700*l.*

20. By indenture, dated the 18th of September, 1863, between Marshall of the one part, and the plaintiff of the other part, which indenture was duly executed by all the parties thereto, J. Marshall, in consideration of 700*l.* then paid to him by the plaintiff, assigned, transferred, and set over unto the plaintiff the said premises demised by the said lease to hold to the plaintiff for the residue then to come of the term of 108 years, less the last five days thereof, subject as therein mentioned.

21. On the execution of this deed the plaintiff paid to Marshall the purchase-money of 700*l.*, and was let into possession of the premises.

22. At the time of entering into the contract for purchase, and at the time of paying his purchase-money, the plaintiff had no personal knowledge of the contract mentioned in paragraph 10, nor of any of the facts mentioned in this case, except so far as such facts are disclosed by the several deeds. Messrs. Mackeson & Goldring acted as the solicitors of the defendant in all the transactions entered into by him with respect to the property as above set forth. They also acted as the solicitors of Marshall with respect to the said property, and also as the plaintiff's solicitors in preparing the indenture of the 18th of September, 1863, and they were then aware of all the circumstances stated in the case, but did not communicate to the plaintiff the objection to the title (if any) created by the deed of the 15th of May, 1852.

23. On the completion of the purchase from Marshall all the original deeds set out in this case were delivered to the plaintiff, and they have ever since been, and are now, in his possession, or of those claiming under him. The plaintiff has since the date of his purchase continued, and he is now in the occupation of the premises. No application or process, or proceeding of any kind, has been taken or made by or on behalf of any person or persons whomsoever in any way to interfere with the beneficial occupation

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or enjoyment of the premises by the plaintiff; but upon the plaintiff attempting to raise money upon the security of the premises, he was met by the objection that his title was bad, on the ground that the sale by the defendant to Paine, carried out by the mortgage of the 15th of May, 1852, was not a due exercise of the power of sale in the mortgage of the 18th of November, 1848.

The plaintiff thereupon brought this action against the defendant for a breach of his covenant in the deed of the 14th of December, 1859, alleging, as a breach or breaches, "that the defendant had not, in pursuance of such power of sale contained in the said indenture of the 18th of November, 1848, sold the said premises to the said Henry Paine, and had, before making the said covenant, made, done, committed, and executed, and knowingly and willingly permitted and suffered, and been party and privy to an act, deed, matter, and thing, whereby and by means whereof the said premises were impeached, charged, incumbered, and otherwise prejudicially affected." The particular act whereby the defendant was alleged to have incumbered the premises being the indenture of May 15, 1852. The defendant pleaded a denial of the breaches. (1)

24. It was agreed that the Court should be at liberty to draw any inferences and find any facts which, in the opinion of the Court, a jury ought to have drawn or found.

26. The questions for the Court were, whether the plaintiff was entitled to succeed on both or either of the breaches in the declaration. (2)

Joshua Williams, Q.C. (*Beresford* with him), for the plaintiff. There are two questions: first, whether the mortgage by the defendant to Paine, of 1852, was a due exercise of the power of sale in the mortgage deed of 1848; and if it was not, secondly, whether the defendant was in consequence guilty of a breach of his covenant in the deed of 1859. A power of sale in a mortgage deed must be carried out strictly, and strict evidence is always required of the

(1) There was also a demurrer, to the breach alleging that the defendant had not, in pursuance of the power of sale, sold the premises to Paine, on the ground that the covenant did not support the breach; but the decision of the Court on the other question rendered it unnecessary to go into the construction of the covenant, and the demurrer was therefore abandoned.

(2) There was also the further question as to the measure of damages, but the decision of the Court rendered it unnecessary to discuss this.

due exercise of such power: *Hobson* v. *Bell* (1); no lapse of time bars the right of the mortgagor to redeem where there has been an improper exercise of the power of sale by the mortgagee; and it is clear he cannot himself become the purchaser: *Robertson* v. *Norris*. (2) There is no decisive authority on the point. *Davey* v. *Durrant* (3) will be relied on by the other side; but Lord St. Leonard's, in commenting on that case, shews that in his opinion under a general power of sale, part of the purchase-money could not be left on mortgage. He says (4), "In *Davey* v. *Durrant* (3) it seems to have been considered that under a general power of sale, a part of the purchase-money may be left on mortgage; but this point did not arise, as the mortgage was a distinct transaction, and the mortgagee who sold submitted to be charged with the whole of the purchase-money, and that, one of the Lords Justices considered, was the proper course." No doubt the opinion of Knight Bruce, L.J., in that case is in favour of the defendant; for he says (5): "It was said that the arrangement by which part of the purchase-money was suffered to remain on a mortgage of the property sold was such as to reduce the price, and was otherwise unjustifiable. But that arrangement appears to me to have increased rather than diminished the price, if the price was at all affected by it. Nor can I say that it is beyond the right or authority of a mortgagee with a power of sale to effect a sale, of which one of the terms shall be that even a considerable portion of the purchase-money shall be allowed to remain on mortgage of the property, that mortgage being as between the seller and those entitled to the equity of redemption at the seller's risk; that is, by charging himself with the whole amount of the purchase-money in account with them, as has been done in the present instance." But in that case there was a special clause in the power of sale that all arrangements by the mortgagee were to be as binding as if the mortgagor had concurred; and Turner, L.J., founds his decision on that clause. (6) Moreover, the purchaser bought bonâ fide, supposing that he had paid the whole purchase-money to the

(1) 2 Beav. 17.

(2) 1 Giff. 421.

(3) 1 De G. & J. 535; 26 L. J. (Ch.) 830.

(4) Sug. V. & P., 14th ed. p. 66, par. 31.

(5) 1 De G. & J. at p. 553; 26 L. J. (Ch.) at p. 835.

(6) 1 De G. & J. at p. 558; 26 L. J. (Ch.) at p. 836.

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mortgagee and had borrowed the money from a third person. Here the whole of the purchase-money, except the deposit of 50*l.*, was allowed to remain on mortgage. The power of sale, taking it together with the clause as to the receipt, shews that the power was conditional on the mortgagee selling for ready money and obtaining a receipt for it from the purchaser. [He then argued the second point, that the covenant in the deed of 1859 coupled with the recitals, which shewed how the defendant sold, was large enough to amount to a covenant that he had duly exercised the power of sale. On this point he cited *Stroughill* v. *Buck* (1); *Lady Cavan* v. *Pulteney* (2); *Severn and Clerke's Case* (3); *Ex parte Collins* (4); *Calvert* v. *Sebright* (5); Bacon's Ab. Covenant (A.)]

Mellish, Q.C. (*Gray, Q.C.*, and *W. W. Mackeson, Q.C.*, with him), for the defendant. It is stated as a fact in the case (par. 10) that there was a valid contract of sale on the 12th of May, 1852; and it is not now open to the plaintiff to contend that it was not bonâ fide; in equity the contract of sale is a sale. The legal estate passed by the mortgage, and the power of sale is only wanted to enable the mortgagee to bar the mortgagor's equity of redemption; and the mortgagor need not be and cannot be compelled to join in the conveyance: *Corder* v. *Morgan* (6), *Clay* v. *Sharpe.* (7) *Davey* v. *Durrant* (8), is a direct decision in the defendant's favour. There is, in substance, in the present power of sale all that there was in the power in that case; and the mortgage there was just as much a part of the contract of sale as it was in this case. As soon as there has been a bonâ fide contract of sale, the power has been exercised, and the equity of redemption is gone; and it matters not how the contract of sale is afterwards carried out. The original mortgagor had the full benefit of the purchase-money as the whole was credited to him in part payment of his mortgage debt.

THE COURT intimated that before going into the second point, they would hear

J. Williams, Q.C., in reply on the first point. It must be ad-

(1) 14 Q. B. 781; 19 L. J. (Q.B.) 209.
(2) 2 Ves. 544.
(3) 1 Leon. 122.
(4) 2 Ir. Ch. Rep. 618.
(5) 15 Beav. 156, 160.
(6) 18 Ves. 344.
(7) 18 Ves. 346, n.
(8) 1 De G. & J. 535; 26 L. J. (Ch.) 830.

mitted that for three days there was a valid contract of sale; and this would have been properly carried out if the assignment had been simply to a nominee of the purchaser; but it was not competent to carry the contract out in this way by leaving the purchase-money charged on the premises so as to make the defendant in effect mortgagee. It might be of the greatest importance to carry out the power literally by a sale for ready money. In the present case there was no surplus; but if there had been a surplus beyond the mortgage debt, it would have made a great difference to the mortgagor whether the money were actually paid, or only credited to the mortgagee, if he were not a substantial person.

LUSH, J. As we are clearly of opinion that the power of sale was duly exercised by the defendant, it is unnecessary to go into the second question as to the construction of the covenant in the deed of 1859.

The question is whether the power given by the mortgagor to sell in case of default was duly and bonâ fide carried out by the mortgagee. If it was, then the mortgagor's right to redeem was barred. Now, that power is given in very extensive terms, and is not fettered by any such conditions as Mr. Williams suggests, or by any such restrictions as he suggests it must be implied are contained in the power. [The learned Judge read the whole of the clause giving the power of sale, including the clause as to the receipt.] Now, Mr. Williams contends that the stipulation that the receipt of the mortgagee for the purchase-money shall be an effectual discharge to the purchaser amounts to a condition, and makes it imperative upon the mortgagee, in order properly to execute that power, that he should sell for money to be paid down, and that he should give a receipt for that money. I am clearly of opinion that that is by no means the true construction of the power, and that the power is not restricted in any such way. The stipulation as to discharging the purchaser is an additional power given to the mortgagee, and is intended to facilitate the sale by relieving the purchaser from the obligation he would otherwise be under, knowing that he was buying of a person holding under a trust. It is an additional power to the mortgagee to discharge the purchaser altogether from that obligation

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by giving a receipt for the money, and it is no restriction upon the power of sale.

The only question then is, has the power been bonâ fide exercised? I quite agree that if under the pretence of a sale the transaction had appeared to be only either an assignment of the mortgage or some other contrivance by which the mortgagee should clothe himself with the absolute, though not apparent, ownership, and if that was done with the intention to oust the mortgagor of his equity of redemption, that would not be an execution of the power. But if there was a bonâ fide sale made under that power it would be utterly immaterial how it was carried out, the only question being whether it was a bonâ fide sale or not.

Mr. Williams admits that when the contract for sale was entered into it was a valid contract, and when it was entered into the right of the mortgagor was barred so far; but then he contends that the contract of sale was afterwards exchanged for some other matter, and that, therefore, the sale not having been carried out, the parties remain as if there had been no bonâ fide sale at all. It is quite conceivable that after such a contract the parties might come to an arrangement for an apparent but a collusive sale. The mortgagee might have said, "I do not want to let you have the property; I would rather keep it myself as the owner," and the apparent purchaser might take a conveyance to himself with an understanding that he should convey the property back again. It is possible, no doubt, that such a state of things might exist, but the question is, did such a state of things exist here? I am by no means satisfied, but, on the contrary, I cannot conceive it to be within the limits of probability, that such was the intention of the parties here. After the contract was made it appears that it was not convenient for the purchaser to pay the money down, and then an arrangement was made by which the defendant agreed to allow the larger portion of the purchase-money to remain on mortgage of the estate; and then in order to secure himself, and to have the estate as a security, instead of conveying it over to the buyer, it was conveyed to a trustee to hold in the first place for the defendant until his mortgage-money was paid. That was a mode of carrying out the original contract which the parties themselves had a perfect right to agree upon. It was carried out, I have no

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doubt, bonâ fide between the parties, and the conveyance was made to an intermediate person who held the property as a trustee. I am clearly of opinion that the sale, being originally as it is admitted to be, a valid sale, was bonâ fide carried out, and that it was carried out in the manner which was thought most convenient to the parties, but in which the mortgagor had no interest whatever.

Mr. Williams contends that a mortgagee cannot exercise a power of sale of this description, unless he receives the whole of the money, and that where the bargain is that the greater part of the mortgage money is to remain on mortgage, that is not a valid execution of the power. Now if any authority could be cited in support of that proposition, we should, of course, be bound by it; but so far from that being the case, the only authority that has been cited with respect to that matter appears to me to be entirely the other way. I look upon the case which has been cited of *Davey* v. *Durrant* (1), as in one respect stronger than the present, because there the original contract for sale was a contract which provided that the purchase money was not to be paid down at once, it was provided that a portion of the purchase money should be either allowed by the vendor to remain on mortgage or procured by the vendor; therefore the original bargain there was such as Mr. Williams contends to-day cannot be deemed a proper execution of the power. In that respect that case differs from this, and yet the sale there was held to be a bonâ fide exercise of the power.

Reference has been made to some observations made by a very high authority, Lord St. Leonards (2); but I do not read the observations of that very learned person in the same way as Mr. Williams does. I take him rather to be intimating that there may be a transaction, which is apparently a sale, but which may not be in reality a sale, and that in such a case there would be no execution of the power. What his Lordship says is that in *Davey* v. *Durrant* (1), the sale and mortgage were distinct transactions. They were distinct transactions in the same sense as they were distinct transactions here. There was a real sale and a real mortgage.

I am therefore of opinion that in this case there was a proper execution of the power. I believe this transaction to have been

(1) 1 De G. & J. 535; 26 L. J. (Ch.) 830. (2) Sug. V. & P. 14th ed. p. 66.

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what it purports to have been, namely, in reality a sale and a mortgage back by the vendee to the vendor.

For these reasons I am of opinion that the title was not incumbered in the way in which it is contended it was incumbered, and that our judgment ought to be for the defendant.

HANNEN, J. I entirely concur in the opinion that our judgment ought to be for the defendant, and I have nothing to add to the reasons which have been given by my Brother Lush.

Judgment for the defendant.

Attorneys for plaintiff: *Murr & Hugo.*
Attorneys for defendant: *Mackeson & Goldring.*

Nov. 23.

THE QUEEN *v.* THE MAYOR OF EXETER.

WESCOMB'S CASE.

Municipal Corporation Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 9—*Burgess List*—"*Inhabitant Householder*"—*Practice.*

Post 115-6

A., after carrying on business and residing at Exeter for many years, went to live in London. He continued his business, which compelled him often to visit Exeter, and he kept some offices and rooms there. He was in Exeter about twenty times since Michaelmas, 1867, staying each time from four to ten days. On these occasions he always transacted his business, slept and took some of his meals in his own rooms:—

Held, that the question whether a person is an inhabitant householder within s. 9 of the Municipal Corporation Act is a question of fact, and depends upon whether there has been such a degree of inhabitance as to be in substance and in common sense a residence, and that A. was an inhabitant householder in Exeter, as there was sufficient evidence to show that he had a residence there as well as in London.

A., having been struck off the burgess list of a borough on objection at the revision, obtained a rule calling on the mayor to show cause why a mandamus should not issue commanding him to admit A. to the office of burgess of the borough. The rule was directed to the mayor only, and he did not appear to shew cause:—

Held, that the burgess on whose objection A.'s name had been struck off had a locus standi, and might be heard to shew cause.

RULE calling on the Mayor of Exeter, to shew cause why a writ of mandamus should not issue, commanding him to admit Charles

Wescomb into the place and office of one of the burgesses of the said city. (1)

Wescomb carried on the business of newspaper proprietor and printer, in Exeter, for seventeen years. For a long time he lived in a house in Exeter, which he quitted shortly before Michaelmas, 1867, having at that time purchased a business in London, where he took a dwelling house and went to reside; but he still continued his business in Exeter. At that time, Wescomb was the owner and occupier of three offices and rooms for an attendant, in Gandy Street, in Exeter. Immediately before quitting his dwelling house in Exeter, he furnished one of the three offices as a bedroom, so that he might reside there when he visited Exeter, which he was often compelled to do to attend to his business there. Wescomb's rooms were approached by a staircase which was private to these rooms, and there was a door of communication between the room furnished as a bedroom, and a room adjoining occupied by the person who attended to Wescomb when he was in occupation. A portion of Wescomb's family slept in these rooms in Gandy Street, for several nights in the years 1867 and 1868. Wescomb had been in Exeter about twenty times since Michaelmas, 1867, for the purpose of attending to his business, and his stay on each of those occasions lasted from four to ten days. During these visits to Exeter, he always occupied the rooms in Gandy Street, transacted all his business, took some of his meals, and slept there. Wescomb kept the rooms solely for his own private accommodation, and could and did use them on all occasions. He was rated in his own name as occupier and owner of the house in Gandy Street, and paid poor-rates and all other rates and assessments in respect of the house. Wescomb's name was on the burgess list in respect of this property, and was expunged on the objection of another burgess, on the ground that he was not an inhabitant householder within s. 9 of the Municipal Corporation Act (5 & 6 Wm. 4, c. 76). It was admitted that he was an occupier within that section.

Charles claimed to shew cause (2) on behalf of the burgess

(1) It would appear that the rule was in the wrong form, and that it ought to have been "to insert the name of Charles Wescomb on the burgess-roll," under 7 Wm. 4, & 1 Vict. c. 78, s. 24.

(2) In the Bail Court, before Blackburn and Hayes, JJ.

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at whose instance Wescomb's name had been struck off the list.

Lopes, contrà, submitted that the objecting burgess had no locus standi.

THE COURT decided that the objecting burgess was entitled to shew cause in the absence of the mayor, although the rule was directed to the mayor alone, and he did not appear. The Court also expressed an opinion that it would in general be well in cases such as this to give notice of the rule to the objecting burgess as well as to the mayor.

Charles. The only question is whether Wescomb is an inhabitant householder. His residence was in London, and there is not sufficient evidence to shew that he had any second residence. In *Whithorn* v. *Thomas* (1), a freeman of T. had a bedroom there, but resided more than seven miles from T. He slept in this bedroom twelve times in six months. It was held that he did not reside at T. during that six months. Wescomb's residence in Exeter is, moreover, colourable. It is for the purpose of entitling himself to vote.

Lopes, in support of the rule. The residence of Wescomb was bonâ fide for the purpose of looking after his business, and not merely colourable. Even if the object of the residence be to obtain a vote, that does not detract from the right of the party: *Whithorn* v. *Thomas.* (1) Wescomb has spent upwards of three months, at least, at Exeter since Michaelmas, 1867, in attending to his business there. This is sufficient evidence that he has, in fact, two residences, one in London, and the other in Exeter. Lord Kenyon, C.J., says, in *Rex* v. *Sargent* (2): "It happens perpetually that persons have different places of abode, in some of which they reside, more or less, as suits their convenience. Was it ever doubted that a fortnight's residence, or less time, did not as much constitute a residence as any greater portion of time?" In *Rex* v. *Duke of Richmond* (3), an information in the nature of a quo warranto was granted to try whether the residence was bonâ fide. There the Duke of Richmond, who did not appear to have been resident in the town before, took a lodging just on the eve of

(1) 7 Man. & G. 1.

(2) 5 T. R. 466, 468.

(3) 6 T. R. 560, 561.

the election, and slept there two or three times in his way to and from the camps in the neighbourhood. This, however, would clearly not be a sufficient residence. The principle upon which *Whithorn* v. *Thomas* (1) was decided is in favour of the present rule, although the actual decision was that there was no residence.

BLACKBURN, J. The real question in this case is whether or not Mr. Wescomb was an inhabitant householder in Exeter. He appears to have had all the other necessary qualifications. If he was, in fact, inhabiting the offices in Gandy Street, that is sufficient. There is no strict or definite rule for ascertaining what is inhabitance or residence. The words have nearly the same meaning. Sleeping once or twice in a place would not constitute inhabitance. There is no precise line to be drawn. It is always, if the inhabiting is bonâ fide, a question of more or less. The question is whether there has been such a degree of inhabitance as to be, in substance and in common sense, a residence. When a person has a country and a town house, it is a mere question of fact whether he has two, or only one residence. When, as in this case, a man leaves one residence to go elsewhere to transact real business, whether he has two residences depends on quantity and amount. It is a pure question of fact. As the residence was clearly not frivolous or merely colourable, I think that the amount of residence was sufficient to entitle Mr. Wescomb to a vote, and there is, therefore, no ground for discharging the rule.

HAYES, J., concurred.

Rule absolute. (2)

Attorney for prosecution: *J. Elliott Fox, for H. W. Hooper, Exeter.*

Attorneys for objecting burgess: *Coode, Kingdon, & Cotton, for Thomas Floud, Exeter.*

(1) 7 Man. & G. 1. (2) See the next case.

1868
Nov. 25.

THE QUEEN *v.* THE MAYOR OF EXETER.

DIPSTALE'S CASE.

Municipal Corporation Act (5 & 6 *Wm.* 4, *c.* 76), *s.* 9—*Burgess List*—"*Inhabitant Householder*"—*Joint Occupation.*

A. occupied a house in Exeter jointly with his partner, and carried on his business there. He had the exclusive use of a furnished bedroom and sitting room. He resided more than seven miles from Exeter. He visited Exeter every day except Sundays, to attend to his business, which he always transacted at this house, and he sometimes took his meals there. His affidavit stated that he "sometimes" slept there:—

Held, that a joint occupation is a sufficient occupation under s. 9 of the Municipal Corporation Act to entitle a man to be placed on the list of burgesses; but,

Held, that A. did not inhabit the house in Exeter so as to constitute him an inhabitant householder under that section.

RULE calling upon the Mayor of Exeter to shew cause why a writ of mandamus should not issue, commanding him to admit Edward Dipstale into the place and office of one of the burgesses of the said city. (1)

Dipstale had carried on the business of a house decorator in Exeter during the last twelve years in a house of his own in Paul Street, where he also resided. In June, 1866, he went to reside at Exmouth, about ten miles from Exeter, but he retained a furnished bedroom and sitting room in his house in Paul Street, which he had occupied up to the present time. He was in Exeter every day, except Sundays, attending to his business. He usually returned to Exmouth in the evening.

Dipstale's affidavit stated, "Sometimes my business causes me to remain in Exeter overnight, and sometimes I require to leave Exeter by an early train in the morning, in either of which cases I sleep in the house in Paul Street." There was no further evidence as to the number of times that he slept in Exeter during the past year.

Dipstale always transacted his business at his house in Paul Street, and often took his meals there when in Exeter. The bed-

(1) It would appear that the rule was in the wrong form, and that it ought to have been "to insert the name of Edward Dipstale on the burgess roll" under 7 Wm. 4, and 1 Vict. c. 78, s. 24.

room and sitting room were so situated that if the doors were locked the rooms would be private and distinct from the other parts of the house, and the occupier of the other parts of the house would not be inconvenienced by the doors being so locked. The house was occupied jointly by Dipstale and his brother, who was his partner in his business, and they were jointly rated for the house. Dipstale's name had been on the list of burgesses, and was removed on an objection being made by another burgess that he was no longer an inhabitant householder in Exeter.

Charles shewed cause (1) on behalf of the objecting burgess. (2) This rule should be discharged; first, because Dipstale was not an occupier within the meaning of s. 9 of the Municipal Corporation Act, as he has only a joint occupation: secondly, because he is not an inhabitant householder. A joint occupation is not sufficient to entitle a person to be placed upon the burgess list: Alcock's Registry Cases, p. 2; Chitty's Statutes, vol. i., p. 963, 3rd ed.; Rawlinson's Municipal Corporation Act, p. 17, 4th ed.

THE COURT intimated that they had no doubt that a joint occupation was sufficient.

Secondly, there is no sufficient evidence of residence. It does not appear how often Dipstale actually slept in Exeter. His affidavit would be satisfied if he slept there twice.

Lopes, in support of the rule. This is a mere question of fact whether or not there was an actual residence: *Reg.* v. *Sergent* (3); *Reg.* v. *Richmond* (4); *Reg.* v. *Boycott* (5); *Whithorn* v. *Thomas.* (6) This is a stronger case than that of Wescomb's. (7) Here Dipstale was in Exeter every day except Sundays, and he sometimes slept there. This is amply sufficient to constitute inhabitance.

BLACKBURN, J. This rule must be discharged. The question is whether Mr. Dipstale is an inhabitant householder. It is a mere question of fact whether he is so or not. In all these cases it is a question of degree, more or less. There is no precise line to be drawn. A person may inhabit a place without sleeping

(1) In the Bail Court, before Blackburn and Hannen, JJ.
(2) See preceding case, ante, pp. 110, 112.
(3) 5 T. R. 466.
(4) 6 T. R. 560.
(5) 14 L. T. (N.S.) 599.
(6) 7 Man. & G. 1.
(7) Ante, p. 110.

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DIPSTALE'S CASE.

there, or he may sleep there without inhabiting it. The fact that a person sleeps in a place is generally a very important ingredient in deciding whether he inhabits it, but it is not conclusive. I agree with what Maule, J., says in *Whithorn* v. *Thomas* (1); and this seems to me to be very much against Mr. Dipstale. The question there was whether there was a residence in a borough where the claimant slept twelve times in six months, and the court thought there was not. Here the mayor has decided as a fact that Mr. Dipstale was not an inhabitant of Exeter, and it rests on Mr. Dipstale to shew that this decision is wrong. The former case of Mr. Wescomb (2) was much stronger than this. Mr. Wescomb was shown to have been in Exeter, and to have slept there, for almost ten weeks in the year. There was, therefore, in that case sufficient ground for questioning the decision of the mayor. Here there is only the occupation of offices where Mr. Dipstale *sometimes* slept. If he slept there twice since he left Exeter, the terms of the affidavit would be satisfied. There is nothing more in his affidavit on this point. This is an insufficient ground for saying that the mayor is wrong.

HANNEN, J. I am of the same opinion. Mr. Lopes has failed to shew that the mayor was wrong. It is not sufficient to say that Mr. Dipstale *sometimes* slept in Exeter. This expression would be satisfied if he had slept there twice. The facts, therefore, are not sufficiently stated. The facts which are relied on should be brought before the court upon the affidavits.

Rule discharged.

Attorney for prosecution: *J. Elliott Fox, for W. H. Hooper, Exeter.*

Attorneys for objecting burgess: *Coode, Kingdon, & Cotton, for Thomas Floud, Exeter.*

(1) 7 Man. & G. 1, 3.

(2) Ante, p. 110.

THE QUEEN *v.* HARDY.

1868
Nov. 23.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *ss.* 12 *and* 14—*Adoption of the Act—Place which includes in its Limits any less Place.*

By s. 14 of the Local Government Act, 1858, "in cases where any place authorized to adopt this act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this act, such less place shall not be entitled to adopt this act unless the greater place within the limits of which it is included has refused to adopt the same," or unless it has been determined by one of the principal secretaries of state, under s. 17, that such less place ought, as respects the adoption of this act, to be excluded from the limits of such greater place.

The parish of L., containing 1400 acres, comprises within its area the corporate borough of L., which is in extent 100 acres. The parliamentary borough of L. comprises the whole of the parish of L., and part of another parish. The majority of ratepayers of the parish of L. adopted the act, and an appeal by some of the ratepayers was made to the secretary of state under s. 17, who dismissed the appeal, and confirmed the adoption of the act throughout the parish:—

Held, that the parliamentary borough, including within its limits a less place, viz. the parish, was not a place authorized to adopt the act; that the parish was a place authorized to adopt the act, including within its limits a less place, viz., the corporate borough, which, if not so included, would of itself be authorized to adopt the act; and therefore the adoption by the parish and the order of the secretary of state were valid.

RULE, calling on the Right Hon. Gathorne Hardy, the secretary of state for the home department, to shew cause why a writ of certiorari should not issue to remove into this Court certain orders made by Mr. Secretary Walpole, ordering the Local Government Act, 1858, to be in force throughout the entire parish of Lymington, in the county of Hants.

It appeared on the affidavits that the parish of Lymington contains about 1400 acres, and comprises within its area the corporate borough of Lymington, which is in extent about 100 acres. The borough is in sch. B. s. 2 of 5 & 6 Wm. 4, c. 76. The portion of the parish which is without the borough is called the "tything of Lymington," and is a place having a known and defined boundary, being a manor of itself, and the inhabitants are separately assessed from those living within the borough for all parliamentary taxes and police rates. The population of the borough at the census of 1861 was 2416, and that of the tything 1655.

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On the 16th of August, 1866, a vestry meeting of the parish was convened by the churchwardens to determine whether the parish would adopt the Local Government Act, 1858, and the vestry resolved to adopt the act by a poll of the parish taken on the 11th of September, 1866.

Doubts having arisen whether the act could be legally adopted by the entire parish by vote of ratepayers, the corporate part of the parish not having adopted the act by its town council as is provided by ss. 12, 24, an appeal was made to Mr. Walpole, the then secretary of state, under s. 17. After due inquiry the secretary of state dismissed the appeal, and on the 14th of December, 1866, made an order, which was duly published in the *London Gazette*, that the Local Government Act, 1858, had been duly adopted by the parish of Lymington, and should have the force of law in the parish from and after the 31st of December, 1866. (1)

(1) 21 & 22 Vict. c. 98, s. 12:—"This act may be adopted (1): In corporate boroughs to which the Public Health Act, 1848, has not been applied by a resolution of the council assembled at a meeting held for the purpose . . . (2) In other places under the jurisdiction of a board of improvement commissioners . . . by a resolution of the commissioners assembled at a meeting held for the purpose. (3) In all other places having a known or defined boundary, by a resolution of the owners and ratepayers."

s. 13:—"Meetings for the purpose of the preceding section shall be summoned on the requisition in writing of any twenty ratepayers or owners—in corporate boroughs by the mayor; in other places under the jurisdiction of improvement commissioners, by the chairman of the commissioners; in places having known and defined boundaries" (not coming under the preceding heads), by the churchwardens, or one of them; or if there are no such officers, by the overseers, or one of them; or if there is none of these officers, or if such officer neglects, or is unable, to perform the duties, by any person appointed by one of the secretaries of state. [Then follow regulations for the passing of resolutions for the adoption of the act.]

s. 14. In cases where any place hereby authorized to adopt this act includes within its limits any less place which, if it were not included, would of itself be authorized to adopt this act, such less place shall not be entitled to adopt this act unless the greater place has refused to adopt such act, or unless it has been determined by one of the secretaries of state that such place ought, as respects the adoption of this act, to be excluded from the limits of such greater place.

s. 17 enables any number not less than one-twentieth of the owners and ratepayers to petition the secretary of state that the whole or any part of such place should be excluded from the operation of the act. And after inquiry (5) the secretary of state shall make order with respect to the matter

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This rule was then obtained on behalf of H. S. Grove, a rate-payer of that part of the parish within the tything.

Sir J. B. Karslake, Q.C. (*A.G.*) (*Archibald* with him), shewed cause. The question turns on the construction of s. 14 of 21 & 22 Vict. c. 98, and the case comes within the express words of the section. The parish of Lymington is a place having a known or defined boundary within s. 12, and is therefore entitled to adopt the act. The borough is a less place included in the parish, and cannot adopt the act unless the parish has refused to adopt it, or unless it has been determined by one of the principal secretaries of state that the borough ought, as respects the adoption of the act, to be excluded from the limits of the parish. There has been an appeal to the secretary of state under s. 17, and he has determined that the act shall be adopted in the entire parish. *Reg.* v. *Northowram* (1) does not apply, as the facts did not bring that case within s. 14. The object of the legislature was to have the act adopted in as large an area as possible, so that the jurisdiction might be confined to one general board, and there might be no conflict of authority.

THE COURT then called upon

Grove, in person, in support of the rule. If the contention on the other side is right, then the borough would be deprived of a right to have a local board constituted in a particular way under s. 24. Under that section the mayor, aldermen, and burgesses are to be the local board. By s. 12 the act may be adopted in corporate boroughs, and by s. 13 the meetings for the purpose of adopting the act are to be summoned by the mayor. These sections shew the intention was that corporate boroughs should adopt the act within their own limits. Moreover, the parish of Lymington had no right to adopt the act, because it is included in the parliamentary borough which comprises the whole parish of Lymington

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in question on such appeal; such order shall be binding on the place in respect of which it is made, and the order shall state the time at which this act is to come into force.

s. 24 :—"The duty of carrying into execution this act shall be vested in the local board, and such local board shall be (1), in corporate boroughs, the mayor, aldermen, and burgesses acting by the council . . . (3) In other places such number of elective members" as may be resolved by the owners and rate-payers &c.

(1) Law Rep. 1 Q. B. 110.

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and part of another parish: see 2 & 3 Wm. 4, c. 64, sch. O., 14 (1); the parish of Lymington is, therefore, itself a less place included in a greater, and by s. 12 the parliamentary borough being a place having a known or defined boundary, could adopt the act, and has not refused to adopt it. *Reg.* v. *Northowram* (2) is directly in point.

COCKBURN, C.J. I do not think the objection last taken by Mr. Grove, that it was not competent for the parish to adopt the act, because the parish itself is comprehended within the parliamentary borough which consists of this parish and of part of another, has really any bearing whatever upon the question. It might as well be said because a parish was in a county it could not adopt the act. A parish is a place having a known or defined boundary. It happens, for parliamentary purposes, to have been united with part of another parish, and in the parliamentary returns for the borough of Lymington there is a district which is more than co-extensive with the parish of Lymington. I do not think that has any bearing on the present case, nor do I quarrel with the decision in *Reg.* v. *Northowram* (2), to which I was no party; but I think that it does not govern the present case. Then comes the question, whether this case is to be included within s. 14. I think it is included within the terms of that section; and looking to the great inconveniences that would arise in holding that, in a borough like this which s comprehended in a parish, the borough can prevent the parish from adopting the act, we ought not to put a limited construction upon s. 14. With regard to the machinery provided by s. 13 to which Mr. Grove has referred, in order to shew that his construction of s. 12 is the correct one, I think the answer is this, the statute, having provided for corporate boroughs and places under the jurisdiction of the improvement commissioners, and places having a known or defined boundary, then makes provision for the way in which the meeting for the purposes of s. 12 shall be summoned, and by whom the requisition in writing shall be signed, and then it follows that the three sub-sections of s. 12 refer to

(1) It did not appear from the affidavits that there was any parliamentary borough, or what its boundaries were; but Grove contended that the Court were bound to know there was a parliamentary borough and its boundaries, as they were created by a public act of parliament.

(2) Law Rep. 1 Q. B. 110.

corporate boroughs, to places under the jurisdiction of improvement commissioners, and then to all other places having a defined boundary and not being corporate boroughs. But I think it is by the light of s. 14 alone that we must see whether a corporate borough, being a less place, is included in the larger, and if it is s. 14 applies; and if a borough proposes to insist on its right to adopt the act, and to have a local board within its own more limited area, instead of adopting the act in common with the rest of the parish of which the borough forms a part, that must be brought before the secretary of state, who will exercise, no doubt, a sound discretion with reference to what is more convenient and preferable to be adopted. And that course having been pursued in the present case, the order made by the secretary of state was with jurisdiction, and the rule must be discharged with costs.

LUSH, J. I am of the same opinion. I think s. 14 in its terms comprehends this case, and I cannot help thinking it was intended to comprehend it. It would create great inconvenience if it were otherwise, because there are the different duties of sewerage, lightage, and watering to be performed, and if there were two different jurisdictions the officers would be more numerous and the expense would be consequently increased. I think the intention was to make the area of the district as large as possible within the fair meaning of the statute. Then comes the second question. It is contended that this parish was not entitled to adopt the Act within s. 14, because it is a less place included within the limits of a larger, that is, this parish and part of another are included in one area for parliamentary representation by 2 & 3 Wm. 4, c. 64. I do not think that that brings the case within the purview of this statute, any more than the association of a number of parishes within a Poor Law Union would make the whole union a place within the statute. I think, therefore, the parish is not a less place within the meaning of s. 14; the parish is the larger place, and the corporate borough is the lesser place within that section.

HANNEN J., concurred.

Rule discharged.

Attorney for defendant: *The Solicitor to the Treasury.*

1868
Nov. 28.

AMYS, APPELLANT; CREED, RESPONDENT.

Nuisances Removal Act, 1855 (18 & 19 *Vict. c.* 121), *ss.* 10, 11, 12, *Sch. Form* (*C.*) —*Notices necessary to found Jurisdiction under s.* 12—*Sanitary Act*, 1866 (29 & 30 *Vict. c.* 90), *s.* 21.

When a nuisance has been ascertained by the local authority to exist on private premises, and a notice has been served under the Sanitary Act, 1866, s. 21, it is not necessary, in order to found proceedings before justices for the abatement, under s. 12 of the Nuisances Removal Act, 1855, that a notice should have been served under s. 11, and Sch. Form (C.) of the latter act.

CASE stated by Justices of Essex, under 20 & 21 Vict. c. 43.

The appellant, the duly authorized clerk of the nuisance authority for the district of the Epping Union, on the 27th of March, 1868, made complaint that there existed in the yard in front of four cottages at, &c., in the district, a nuisance, viz., a privy and cesspool, so foul as to be injurious to health, and that such nuisance was caused by the default or sufferance of the respondent, the owner of the premises; a summons accordingly issued.

At the hearing, on the 3rd of April, it was proved that on the 11th of March a notice (of which the following are the material parts) was served on the respondent:—

"To Mr. George Creed, of, &c., owner of the cottages or tenements occupied by the persons mentioned (giving the names in the margin), and situate at, &c.

"Whereas, the nuisance authority for the district of the Epping Union have received a notice from a sanitary inspector appointed by and acting under the said nuisance authority, stating that there exists in the yard in the front of the cottages or tenements occupied by the persons mentioned (giving the names in the margin), and situate at, &c., in the said district, under the Nuisances Removal Acts for England, the following nuisance, namely: a privy and cesspool so foul as to be injurious to health, and that such nuisance is caused by the default or sufferance of you, the said George Creed: Wherefore the said nuisance authority, in pursuance of the statute, hereby give you notice to abate the said nuisance, and for that purpose to execute such works, and to do all such things as may be necessary, within ten days from the day of the date hereof. Further take notice, that unless this notice be complied with by you within the time aforesaid, a summons will be issued requiring your attendance to answer a complaint which will be made to the justices for enforcing the removal of the said nuisance, and prohibiting a repetition thereof, and for recovering the costs and penalties that may be incurred thereby." Dated the 11th of March, 1868, and signed by the chairman.

No other notice had been served on the respondent, nor any notice whatever upon any of the tenants or occupiers.

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It was admitted on both sides that the respondent is owner, and that the four cottages are private premises within the meaning of the Acts, and that they are in the several occupations of four tenants.

It was also proved that the notice to the nuisance authority referred to in the above notice had been given by a sanitary inspector duly appointed by them, and that he had entered and inspected the premises, and ascertained the existence and continuance of the nuisance complained of, previously to giving his notice to the nuisance authority, and also on the morning of the day on which the appellant made his complaint.

For the respondent it was contended that the notice served was, in fact, merely the notice required by the Sanitary Act, 1866, (29 & 30 Vict. c. 90), s. 21 (1), to be served by the nuisance authority previous to taking proceedings before justices, under s. 12 of the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121) (2), and

(1) 29 & 30 Vict. c. 90, s. 21 :—"The nuisance authority or chief officer of police shall, previous to taking proceedings before a justice under the 12th section of the Nuisances Removal Act, 1855, serve a notice on the person by whose act, default, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, on the owner or occupier of the premises on which the nuisance arises, to abate the same, and for that purpose to execute such works and do all such things as may be necessary within a time to be specified in the notice."

(2) By 18 & 19 Vict. c. 121, s. 10, notice of nuisance may be given to the local authority by any person aggrieved thereby, or by, inter alios, the sanitary inspector; "and the local authority may take cognizance of any such nuisance after entry made as hereinafter provided, or in conformity with any improvement act under which the inspector has been appointed."

s. 11 :—"The local authority shall have power of entry for the following purposes of this act, and under the following conditions :—

1. To ground proceedings. For this purpose, when they or any of their officers have reasonable grounds for believing that a nuisance exists on any private premises, demand may be made by them or their officer, on any person having custody of the premises, of admission to inspect the same at any hour between nine in the morning and six in the evening; and if admission be not granted, any justice having jurisdiction in the place may, on oath made before him of belief in the existence of the nuisance, and after reasonable notice of the intended application to such justice being given in writing to the party on whose premises the nuisance is believed to exist, by order under his hand, require the person having the custody of the premises to admit the local authority or their officer; and if no person having custody of the premises can be discovered, any such justice may and shall, on oath made before him of belief in the existence of such

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proceedings under s. 12 can only be taken where a nuisance is "so ascertained to exist," that is, in manner prescribed by ss. 10 and 11, or where the nuisance, in their opinion, did exist at the time when the notice (that is, as he contended, the notice required by ss. 10 and 11, and being form (C.) in the schedule to the Act) was given;

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nuisance, and of the fact that no person having custody of the premises can be discovered, by order under his hand authorize the local authority or their officers to enter the premises between the hours aforesaid" . . . .

s. 12:—"In any case where a nuisance is so ascertained by the local authority to exist, or where the nuisance in their opinion did exist at the time when the notice was given, and, although the same may have been since removed or discontinued, is in their opinion likely to recur, or to be repeated on the same premises, or any part thereof, they shall cause complaint thereof to be made before a justice of the peace; and such justice shall thereupon issue a summons requiring the person by whose act, default, permission, or sufferance the nuisance arises or continues, or if such person cannot be found or ascertained, the owner or occupier of the premises on which the nuisance arises, to appear before any two justices, in petty sessions assembled at their usual place of meeting, who shall proceed to inquire into the said complaint; and if it be proved to their satisfaction that the nuisance exists, or did exist at the time when the notice was given, or, if removed or discontinued since the notice was given, that it is likely to recur or to be repeated, the justices shall make an order in writing under their hands and seals on such person, owner, or occupier for the abatement or discontinuance and prohibition of the nuisance as hereinafter mentioned, and shall also make an order for the payment of all costs incurred up to the time of hearing or making of the order for abatement or discontinuance or prohibition of the nuisance."

"SCHEDULE FORM (C.)

Notice to owner or occupier, of entry for examination.

To the owner [*or* occupier *as the case may be*] of [*describe the premises*] situate at [*insert a description sufficient to identify the premises.*]

Take notice, that under the Nuisances Removal Act for England, 1855, the [*local authority, naming it*] in whose district under the said act the above premises are situate, have received a notice from [*name complainant*] stating that in or upon the said premises [*insert the cause of nuisance as set forth in the notice.*]

And further take notice, that after the expiration of twenty-four hours from the service of this notice the [*local authority*] will cause the said premises to be entered and examined under the provisions of the said act, and if the cause of nuisance aforesaid be found still existing, or, though removed or discontinued, be likely to be repeated, a summons will be issued requiring your attendance to answer a complaint which will be made to the justices for enforcing the removal of the same, and prohibiting a repetition thereof, and for recovering the costs and penalties that may be incurred thereby.

Dated this, &c.

A. B.,

The officer appointed by the [*local authority*] to take proceedings under the Nuisances Removal Act for England, 1855."

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and that, inasmuch as that notice is not merely a demand of entry, but is also a notice to the occupier to remove or discontinue the nuisance within twenty-four hours, it ought to have been served previous to and in addition to the notice required by s. 21 of the Act of 1866, and the more especially with reference to s. 56 of that Act, making the powers therein cumulative.

The appellant contended that the notice (C.) was unnecessary.

The justices decided that the notice (C.) ought to have been served previous to and in addition to the notice required by the Act of 1866, and, in the absence of evidence, that such notice (C.) had been served, dismissed the summons, and ordered 4*l.* 17*s.* 6*d.* costs to be paid to the respondent by the appellant.

The question for the Court was, whether previous and in addition to the notice required by s. 21 of the Sanitary Act of 1866, a notice in the form or to the effect of Form (C.) in the schedule to 18 & 19 Vict. c. 121, should have been served. If the Court should be of opinion that the notice (C.) need not have been served, the order was to be quashed, otherwise it was to stand.

W. B. Cooper, for the appellant. The sanitary inspector has given notice and entered under s. 10 of 18 & 19 Vict. c. 121, and a nuisance has been ascertained to exist. The justices therefore were wrong in holding a notice in form (C.) to be necessary to found jurisdiction under s. 12. That notice is only required by s. 11, when it is necessary to enter to ascertain the existence of the nuisance, and an entry cannot be obtained without an order of a justice. Section 41 says that the forms in the schedule, varied as necessary, may be used as instruments under the Act, but entrance by consent does away with the necessity of a notice (C.) If, however, any doubt existed as to the necessity of a notice in form (C.) before taking proceedings under s. 12, the form being not only a notice of intention to enter, but also a notice to abate, that is, at all events, now superseded by s. 21 of 29 & 30 Vict. c. 90, which requires a notice to abate and to do all things necessary for the purpose within a certain time to be served in all cases before taking proceedings under s. 12. That notice has been served, and therefore the proceedings were well commenced; and the justices ought to have heard the complaint.

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The respondent did not appear.

LUSH, J. I am of opinion that the decision of the justices was erroneous. Under s. 10 of the Act of 1855 notice may be given to the local authority by any person aggrieved or by certain officers, one of whom is the inspector of nuisances; and by s. 11 the local authority have power to enter premises in order to ground proceedings, when they or their officers have grounds for believing a nuisance to exist; and, if they cannot obtain entry without, they may obtain it under an order of a justice after reasonable notice of the application to the party on whose premises the nuisance is believed to exist, and in such a case notice in the form (C.) would be necessary and proper; but if the nuisance is ascertained to exist, then that notice is unnecessary. It is true that s. 12 enables the local authority to summon the offending party before justices in cases where a nuisance has been "so ascertained to exist," but that is not necessarily after a notice as pointed out by s. 11, and the notice mentioned in s. 12 is not the notice to be given by the local authority under s. 11, but the notice to the local authority under s. 10; and if the nuisance be proved to still exist, or to be likely to recur, the justices have jurisdiction to make an order, provided the notice to abate required by s. 21 of the SanitaryAct, 1866, has been served previously to taking out the summons. That notice has been served in the present case, and the proceedings therefore are regular, and the justices ought not to have dismissed the summons and made the order they did.

HANNEN, J. The argument for the respondent must rest on the words "*so* ascertained:" but it would be an absurdity to say that there must have been a notice and an entry to ascertain the existence of a nuisance, where the nuisance might have been of such a kind as to require no entry to ascertain its existence. Under s. 12 jurisdiction is given when the existence of the nuisance is ascertained by the local authority; there must have been an ascertainment, but it is not confined to the particular manner pointed out by s. 11. This is borne out by s. 21 of the Sanitary Act, 1866, which requires a notice to be served in all cases previously to pro-

ceeding under s. 12 of the old act; and a notice under s. 21 has been served.

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HAYES, J. A notice and entry under it could not be necessary, as the nuisance was palpable.

Order quashed, and case remitted for rehearing.

Attorneys for appellant: *Lawrence, Plews, & Boyer.*

FORD AND OTHERS *v.* COTESWORTH AND ANOTHER.

Dec. 17.

Ship and Shipping—Charterparty—Contract implied by Law, when Charterparty silent as to Time for Discharge.

Where a charterparty provides that the ship shall proceed to a certain port, and there, or as near thereto as she can safely get, deliver the cargo in the usual and customary manner, but is silent as to the time to be occupied in the discharge, the contract implied by law is, that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him; and there is no implied contract that the discharge shall be performed in the time usually taken at the port.

Where therefore a ship, under such a charterparty, was in the course of unloading at the port of discharge, and owing to a threatened bombardment of the port, the authorities there refused for several days to allow any more of the cargo to be landed, the loss from the delay must fall on the shipowner, and he cannot recover damages from the charterer.

FIRST count, that the plaintiffs and defendants agreed by charterparty that the plaintiffs' ship *Craigie Lea*, then at Liverpool, should immediately be made ready to receive cargo, and should when loaded, proceed with all convenient speed to Lima or Valparaiso, and that defendants should load her with a full and complete cargo which she should carry and there deliver to defendants' consignees upon the terms (among others) that the ship should be unloaded at her port of discharge by the defendants' consignees with all due and reasonable despatch, and within a reasonable time for so doing; that the ship was duly loaded and proceeded to Lima, and was there ready to deliver the cargo, and all conditions, &c., were fulfilled and happened to entitle plaintiffs to have the charterparty performed by defendants, yet the defendants' consignees did not nor would unload the ship at her port of dis-

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charge with due and reasonable despatch, nor within a reasonable time in that behalf for so doing; but delayed and kept and detained the ship for divers long and excessive and unreasonable times; concluding with special damage.

Counts for demurrage, and on accounts stated.

Pleas (to first count): 1. That it was not agreed as alleged. 2. A traverse of the breaches. 3. That it was by the charterparty provided that the defendants should not be liable in respect of (amongst other things) any delay in the unloading of the ship, or for any delay in keeping or detention thereof, caused by the acts or restraints of princes and rulers, and the defendants were always ready and willing to unload the ship with due and reasonable despatch, and within a reasonable time in that behalf, and did not detain the ship for divers long and unreasonable times, but used the best care and despatch in the premises; but the delay complained of by plaintiffs was caused solely by measures and things beyond the power and control of the defendants, and by the charterparty excepted, to wit by the the acts or restraints of princes and rulers within the meaning of the charterparty.

4 and 5 (to the other counts): Never indebted, and payment.

Issue taken and joined.

At the trial before Cockburn, C.J., at the sittings in London, after Trinity Term, 1867, it appeared that the plaintiffs' agents and the defendants, in July, 1865, signed a charterparty of the plaintiffs' ship *Craigie Lea*, of which the following are the material parts:—

"MEMORANDUM FOR CHARTER:—Liverpool, 24th July, 1865.—It is this day agreed between Messrs. J. P. & Co., agents for owners of the ship *Craigie Lea*, of the registered burthen of 626 tons, . . . of the one part, and Messrs. Cotesworth, Lyne, & Co., freighters or charterers, of the other part, witnesseth that it is agreed that . . . the said vessel shall immediately be made ready and receive, and take on board from the charterers, such goods as they may have to ship, or a full and complete cargo of lawful merchandise, specie, and powder in the river, if required by the charterers, the owners employing sufficient hands for the purpose, and on receiving orders from the charterers shall proceed to Lima or Valparaiso, and there, or so near thereto as she may safely get, deliver the said cargo in the usual and customary manner, agreeable to bills of lading, and so end the voyage. In consideration whereof the charterers shall deliver alongside the goods to be taken on board the vessel, and shall and will pay for the use and hire of the vessel in respect of the said voyage and in full of all freight, primage, pilotage, port charges, &c., the sum of 1500*l.* sterling in full if to Lima, 1300*l.* sterling in full if to Valparaiso, . . . and the charterers shall be allowed for the purpose of

loading the vessel, forty-five running days, Sundays excepted throughout this charter, if not sooner despatched, to be computed from the arrival of the vessel at a proper place of loading in the Salthouse Dock, having a clear hold and being in readiness to load, and notice thereof being given in writing to the charterers. And for every day the vessel shall be detained beyond that time by the charterers, demurrage shall be paid by them at the rate of 4*l.* per day, but to cease on the charterers' despatches being left on board the vessel, or tendered by them to the captain, and should the vessel be detained by contrary winds when the lay days have expired, or by other causes over which the charterers have no control, she is to take in goods without payment of demurrage. . . . That the master shall sign bills of lading in the usual and customary manner and at the rate of freight that may be filled in and made payable in any manner the charterers may choose without prejudice to this charter. . . . That the vessel shall be consigned to the charterers' agents at her port of discharge, inwards and outwards, the owners paying the customary commission. That the vessel shall not be chartered in this country for the return voyage without the consent of the present charterers. . . It is also further agreed that the vessel shall, by the owners thereof, during the whole of the said voyage be kept tight, staunch, and strong, and well found and provided with men and mariners sufficient and able to navigate the vessel, with all manner of rigging, boats, tackle, provisions, and appurtenances whatsoever (restraints of princes and rulers, the dangers of the seas, and navigation, fire, pirates, and enemies throughout this charterparty always excepted.) . . .

The ship having loaded a full cargo, was ordered to Lima, and she arrived at Callao, the port of Lima, in February, 1866, and took up her berth and was ready to unload, of which notice was given to the defendants' consignees, on the 1st of March; and after a delay of some days she commenced unloading. At Callao goods can only be landed by launches or lighters (which are provided by the merchant), and only through the custom-house; the authorities are very dilatory, as are also the persons employed in the work; unloading at Callao is, consequently, always very slow. In 1865-6 there was war between Spain and Chili, and Peru was involved in the hostilities; and while the ship was unloading, news of the bombardment of Valparaiso by the Spanish fleet reached Callao on the 11th of April. In consequence, the authorities refused to allow any more cargo to be landed at the custom-house, in order that they might empty it, as it would be exposed to the Spanish ships of war. On or about the 18th, the shipping was ordered by the authorities to remove out of the anticipated line of fire if the Spanish fleet bombarded the port; and on the 26th of April, in consequence of peremptory orders from the Spanish admiral, the plaintiff's ship removed from her berth some miles

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out of the way. On the 12th of May, the Spanish fleet having retired, the ship returned to her berth and finished discharging her cargo on the 22nd of June. The evidence given at the trial, chiefly depositions, was very long, and was contradictory as to whether or not the ship, though taking so long a time, was unloaded within the usual time occupied at Callao, and much weight was attached by the defendants' counsel and the Chief Justice to a memorial signed by a great number of the chief merchants, &c., at Callao, which had been presented to the Peruvian Government just at the time the ship arrived at Callao, complaining of the ruinous delay which occurred in unloading ships in that port.

The Chief Justice reserved the question for the Court as to the liability of the defendants, under this charter, to demurrage for the time (agreed at seven days) during which the ship lay at her berth but could not unload owing to the refusal of the authorities to allow the cargo to be landed. And he directed the jury that, the charterparty being silent as to the time for unloading, there arose an implied contract on the part of the freighter to unload and discharge within a reasonable time, and therefore if there was any unreasonable delay in unloading the cargo and discharging the ship, the plaintiffs were entitled to a verdict. That the question whether the time occupied was reasonable or unreasonable, was to be judged with reference to the means and facilities available at the port, and to the regulations and course of business at the port; and there would be a point of law whether this question was to be decided with reference to the ordinary state of things at the port, or whether any extraordinary circumstances that prevented the unloading may be taken into account.

The first question for the jury was, whether, looking to the ordinary state of things at the port, there was any unreasonable delay, either before the unloading was suspended, or after it was resumed. Secondly, whether looking to the existing, that is, the extraordinary circumstances, there was any unreasonable delay, either before the unloading was suspended, or after it was resumed. Thirdly: From the 12th of May, when the ship returned to her berth, to the 22nd of June, the date of discharge, was any delay caused by political circumstances over which the consignees had no control? If so, for how many days? Was any delay caused by the

default of the consignees? If so, how many days? The Chief Justice also desired the jury, in respect of the time when the ship was at her berth doing nothing, to assess the damages provisionally, and to say what would be the proper amount of demurrage per day, if demurrage ought to be paid. The Chief Justice also directed the jury that the time from the 26th of April to the 12th of May, during which the ship was out of port, was to be considered out of the case, the ship not having been ready to deliver cargo.

The jury, in answer to the first two questions, found that there had been no unreasonable delay, and they assessed the demurrage, if any were to be allowed, at 15*l.* a day.

On this finding, a verdict was entered for the defendants, with leave to the plaintiffs to move to enter it, as to the seven days, for 105*l.*

A rule was accordingly obtained to enter the verdict for 105*l.*, and for a new trial, on the grounds, first, that the cargo was not discharged within a reasonable time, the delay having been caused by political and other extraordinary circumstances not within the contemplation of the parties. Secondly, that the verdict was against the weight of evidence, in finding that there was no delay beyond the ordinary usage of the port.

May 22, 23, 25. *Milward, Q.C.*, and *C. Russell*, shewed cause. On the point reserved they contended that when a charterparty is silent as to the time to be allowed for unloading, the contract of the charterer is only to land the cargo within such time as is reasonable, reference being had to the ordinary circumstances and usage of the port and also to any extraordinary circumstances, over which the charterer or his consignees have no control, tending to cause unusual delay.

Field, Q.C., and *Philbrick*, in support of the rule, contended that when a charter is silent as to the number of days to be allowed the merchant for unloading, the charter must be construed as if the number of days had been inserted within which a ship of the same burthen as the chartered ship would usually be unloaded at the particular port of discharge, and therefore that the charterer would be liable for any delay beyond that usual time; and the

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defendants would be liable for the seven days during which the ship was detained at her berth doing nothing.

[In addition to the cases noticed in the judgment the following cases were cited: *Paradine* v. *Jane* (1), *Hudson* v. *Ede* (2), *Barret* v. *Dutton* (3), *Phillips* v. *Irving* (4), *Goodwyn* v. *Cheveley*. (5)]

Cur. adv. vult.

Dec. 17. The judgment of the Court (Cockburn, C.J., Blackburn, and Lush, JJ.), was delivered by

BLACKBURN, J. (6) This was an action to recover compensation in damages for the detention of the plaintiffs' ship by the defendants.

On the trial before the Lord Chief Justice, at Guildhall, it appeared that the defendants chartered the plaintiffs' ship from Liverpool to Lima or Valparaiso. By the charterparty a specified number of days were agreed upon for *loading* the vessel at Liverpool, but there was no such agreement as to the discharge at her port of destination, the charterparty merely providing that the vessel should proceed there, or as near as she could safely get, and there deliver the cargo in the usual and customary manner, agreeably to bills of lading, and so end the voyage. The contract being thus silent as to the time which is to be occupied in the discharge, the question arises what is the agreement which the law implies in such a case.

It appeared on the trial that the vessel duly arrived at Callao, the port of Lima, and began to discharge in the manner usual there. The custom-house authorities will not allow any cargo to be landed except through the customs; and in consequence of their dilatoriness, and the general sluggishness of the population, the ordinary discharge of a vessel at Callao is very slow. The vessel remained discharging till, news having arrived of the approach of the Spanish fleet, the customs authorities suspended all landing of goods, in order that they might remove those already in the custom-house out of the reach of the apprehended

(1) Aleyn, 26, 27.
(2) Law Rep. 3 Q. B. 412.
(3) 4 Camp. 333.
(4) 7 M. & G. 325.
(5) 4 H. & N. 631; 28 L. J. (Ex.) 298.
(6) Blackburn, J., being engaged at Nisi Prius, the judgment was read by Hannen, J.

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bombardment. The vessel consequently lay with the cargo partly on board for seven days, when she was ordered away to be out of the danger of bombardment. She returned, and her discharge was finally completed.

The Lord Chief Justice ruled that during the period when the vessel was not at Callao at all, there was no claim for damages. He reserved for the Court the question whether the plaintiffs were entitled to recover for the detention during the seven days when the vessel was at her discharging berth, but owing to the unusual state of things, the customs authorities would not allow the discharge to proceed. The damages for that detention, if the plaintiffs were entitled to recover, were agreed to be 105*l.*

As to the rest of the detention, he left the question to the jury whether the detention was occasioned by any thing beyond the usual and ordinary delays of the port. The jury found on this point for the defendants. Mr. Field obtained a rule to enter the verdict for the plaintiffs for 105*l.*, pursuant to the leave reserved, or for a new trial, on the ground that the verdict was against the weight of evidence. No complaint was made of the direction in point of law. On the argument in last term the Court refused to disturb the verdict, and took time to consider as to the point reserved.

We have come to the conclusion that the plaintiffs are not entitled to recover. The question depends upon what the contract implied by law is, where there is a charterparty silent as to the time to be occupied in the discharge. We agree that whenever a party to a contract undertakes to do some particular act, the performance of which depends entirely on himself, so that he may choose his own mode of fulfilling his undertaking, and the contract is silent as to time, the law implies a contract to do it within a reasonable time under the circumstances. And if some unforeseen cause, over which he has no control, prevents him from performing what he has undertaken within that time, he is responsible for the damage. But where the act to be done is one in which both parties to the contract are to concur, and both bind themselves to the performance of it, there is no principle on which, in the absence of a stipulation to that effect, either expressed by the parties, or to be collected from what they have expressed, the damage arising from an unfore-

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seen impediment is to be cast by law on the one party more than on the other; and consequently we think that what is implied by law in such a case is, not that either party contracts that it shall be done within either a fixed or a reasonable time, but that each contracts that he shall use reasonable diligence in performing his part. It is on the application of this principle to a charterparty that the present question depends. We think that delivering cargo is as much the duty of the shipowner as of the merchant; and consequently that the contract, implied by the law, in the absence of any stipulation, in a charterparty, is that each party shall use reasonable diligence in performing his part of the delivery at the port of discharge, the merchant being ready to receive in the usual manner, and the owner by his captain and crew to deliver in the usual manner. So that there is no contract implied by law on the part of the shipowner to allow his vessel to be kept there for the usual time, if by reasonable diligence on the part of the merchant, the cargo might be sooner taken away, and no contract implied by law on the part of the merchant to take the cargo out within such usual time, if he could not by reasonable diligence perform it: though very commonly there are stipulations to that effect.

There is not much authority bearing on the point on which we have had most difficulty. We think it firmly established, both by decided cases and on principle, that where a party has either expressly or impliedly undertaken, without any qualification to do anything, and does not do it, he must make compensation in damages, though the performance was rendered impracticable by some unforeseen cause over which he had no control. And in a charterparty the merchant, generally, expressly contracts that he will provide a cargo to be put on board. The shipowner has nothing whatever to do with the mode in which the merchant is to fulfil this contract. Accordingly where the merchant is prevented by an unforeseen cause from fulfilling it, the shipowner is entitled to compensation in damages: *Barker* v. *Hodgson.* (1) In the present charterparty, as is generally the case, the parties have agreed upon a specified number of lay days for putting the cargo on board. Where a charterparty is silent, as it rests exclusively on the merchant to procure the cargo, the law would imply a

(1) 3 M. & S. 267.

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contract to do so within a reasonable time after the vessel is ready to receive cargo. And we agree that in estimating what is the reasonable time within which the cargo is to be provided, we are to consider what is a reasonable time under ordinary circumstances; and not to take into account any peculiar difficulty which may have arisen from the mode in which the merchant has chosen to procure the cargo: *Adams* v. *Royal Mail Steam Packet Company* (1); *Kearon* v. *Pearson.* (2) It may be different if the contract is framed with reference to any peculiar state of things: *Harris* v. *Dreesman.* (3) It would rather appear from the declaration set out in the report of *Adams* v. *Royal Mail Steam Packet Company* (4) that the contract expressly provided for a number of lay days, and ten days on demurrage; but perhaps those were only allowed for the discharge of the cargo at St. Thomas, otherwise no question as to any implication of a reasonable time could have arisen. However this may have been, it is pointed out by Williams J. (4), "that the circumstances relied on to excuse the breach are circumstances which impede, not the loading, but the procuring the coals wherewith to load the vessel," and that was unquestionably true; the case was clearly rightly decided, but the present point did not arise. In *Kearon* v. *Pearson* (5), Wilde, B., says that the stipulation in that case "that the vessel shall be loaded with usual despatch," does not relate to the facilities which the charterers may have in their trade of getting the coal alongside the vessel (which by express stipulation was to be loaded in the Nelson Dock), but to the putting it on board; but that even if it were otherwise, there was an express stipulation that it should be loaded with usual despatch, not with usual diligence. In this also we perfectly concur, but that case has no bearing on the question of what is implied when the contract is silent as to the time for discharging the cargo.

Whenever in the charterparty it is agreed that a specified number of days shall be allowed for unloading, and that it shall be lawful for the freighter to detain the vessel for that purpose a

(1) 5 C. B. (N.S.) 492; 28 L. J. (C.P.) 33.
(2) 7 H. & N. 386; 31 L. J. (Ex.) 1.
(3) 23 L. J. (Ex.) 210.
(4) 5 C. B. (N.S.) at p. 494; 28 L. J. (C.P.) at p. 34.
(5) 7 H. & N. at p. 390.

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further specified time on payment of a daily sum, this constitutes a stipulation on the part of the freighter that he will not detain her beyond those two specified periods: *Randall* v. *Lynch* (1); Lord Tenterden (Abbott on Shipping, 5th ed., p. 181; 11th ed., p. 268), says: "And when the time is thus expressly ascertained and limited by the terms of the contract, the merchant will be liable to an action of damages, if the thing be not done within the time, although this may not be attributable to any fault or omission on his part; *for he has engaged that it shall be done.*" The last sentence is put in italics by Lord Tenterden, indicating that he thought it the reason why the merchant was liable. In the present case the time for discharging is not so limited; all that is said is, that the cargo shall be discharged in the usual and customary manner; that is to say, that the master and crew shall take that part which by the custom of the port falls on them, and the freighter do the rest. And as we have before observed, it is difficult to see on what principle delay in an act in which both sides are to concur, is, in the absence of a stipulation in the contract, to fall on one more than the other, if neither be in fault. In *Rodgers* v. *Forresters* (2), the express contract was that "the said freighter should be allowed the usual and customary time to unload the said ship at her port of discharge;" and in *Burmester* v. *Hodgson* (3), where the contract was silent, Mansfield, C.J., said that the law could only raise an implied promise to do what was in *Rodgers* v. *Forresters* (2) stipulated by an express covenant, viz., to discharge the ship in "the usual and customary time." On this Mr. Field based his argument that the charterparty was to be construed, as if a specified number of lay days for discharging the cargo had been inserted in it, the only difference being that instead of the parties fixing the number of days they left that to be ascertained by subsequent inquiry as to what was usual and customary in the port for such a vessel. And if that is so, it would follow that the plaintiffs are entitled to recover; for it is clear that delay resulting from a threatened bombardment was neither usual nor customary.

But we are aware of no authority for saying that the law implies

(1) 2 Camp. at p. 356; 12 East, 179. (2) 2 Camp. 483.
(3) 2 Camp. at p. 489.

a contract to discharge in the *usual time*, except what is said in *Burmester* v. *Hodgson* (1), in which case it was not necessary for the decision. We think that the contract which the law implies is only that the merchant and shipowner should each use reasonable despatch in performing his part. That such was the opinion of Lord Tenterden appears to be implied from his ruling in *Rogers* v. *Hunter* (2), as to what was the obligation of the holder of a bill of lading.

If this be so, the delay having happened without fault on either side, and neither having undertaken by contract, express or implied, that there should be no delay, the loss must remain where it falls.

It is true that at Callao the usual course appears to be for merchants to procure lighters, and that the master and crew have fulfilled their part of the duty of delivering cargo when they have assisted in getting the cargo out of the ship and putting it on board the lighters; and it might have been physically possible for the merchant in this case to have procured so many lighters that the cargo might have been all taken out of the ship and put in these lighters, though the customs authorities would not permit any of those lighters to be unloaded; but the construction of the charterparty must be the same whatever, by the custom of the port of discharge, be the share of the shipowner in delivering cargo; and we do not think that the merchant was bound to do such an unreasonable thing. If the contract be, as we construe it, only to use reasonable diligence in performing his part of the delivery, he was guilty of no breach, whilst the landing of the cargo was rendered impossible by a cause over which he had no control.

We think, therefore, the rule should be discharged.

Rule discharged.

Attorneys for plaintiffs: *Clarke, Son, & Rawlings.*
Attorney for defendants: *Lydall.*

(1) 2 Camp. at p. 489. (2) M. & M. at p. 65.

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Nov. 26.

[IN THE EXCHEQUER CHAMBER.]

HYAMS *v.* WEBSTER.

Negligence—Highway—Metropolitan Board of Works, Liability of, for Subsidence in Highway—Metropolis Management Acts, 18 & 19 *Vict. c.* 120, *ss.* 110, 111, 25 & 26 *Vict. c.* 102, *s.* 33.

The defendant, under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; some months after the work was finished, damage ensued to the plaintiff from his horse stumbling in a hole in the road. The filling in of the road had been properly done by the defendant, and the hole was owing to the natural subsidence of the materials, which sometimes takes place, to a greater or less degree, six months or longer after such an excavation has been filled in:—

Held (affirming the judgment of the Court of Queen's Bench), that the defendant was not liable to the plaintiff for the damage: for that there was no obligation on the defendant by common law or statute to do more than properly reinstate the road.

Appeal by the plaintiff from the decision of the Court of Queen's Bench, making absolute a rule to enter a nonsuit. (1)

The declaration charged that the defendant was employed as a contractor by the Metropolitan Board of Works to break up and open certain parts of a public highway called St. Mark's Road, Kennington, and afterwards to make good the surface of the highway; that, having opened it, the defendant did not make good the surface, but wrongfully and negligently permitted and caused divers holes and ruts to remain in the surface, without taking any care to guard against danger or damage to horses, &c., passing along the highway, whereby a horse and cart of plaintiff's, driven by plaintiff's servant, and in which was plaintiff's wife, was driven into one of the holes, and the horse thrown down, and plaintiff's wife thrown out and injured.

Plea: Not guilty by statute, 25 & 26 Vict. c. 102, s. 106.

At the trial before Cockburn, C.J., at the sittings in London after Hilary Term, 1866, the following facts were proved:—The defendant is a contractor, and had been engaged by the Metropolitan Board of Works to construct a sewer along the highway called St. Mark's Road, Kennington, and for that purpose it was

(1) Law Rep. 2 Q. B. 264.

necessary to cut a trench in the highway, and, after building the sewer, to fill in the trench, or opening, and restore and make good the surface of the highway. The defendant opened the highway in or about the month of May, 1864. The sewer was built and finished, and the defendant afterwards filled in the opening, or trench, in the highway, and such filling in was completed in about two months after the road was first broken open, and was properly done; and when the defendant's men finished, in August, 1864, the surface of the road had been properly reinstated and made good, and the top metalling put in its proper position.

Some little time after the opening had thus been filled in, holes and ruts began to appear in the highway. They were caused by the subsidence of the filling in of the trench. The defendant did nothing whatever to the road after he had first filled in the trench. A subsidence, to a greater or less degree, sometimes takes place six months or longer after an excavation of this description has been filled in.

The plaintiff's horse and cart, on the 17th of February, 1865, about eight o'clock in the evening, being driven by the plaintiff's son, fell into a hole in the highway, the hole being caused by the subsidence of the filling in executed by the defendant, whereby injury was sustained by the plaintiff's wife, who was riding in the cart.

The highway is not a turnpike road, nor had it been repaired by the parish in which it was situate, after the openings were made, and after they were filled in by the defendant. The foreman of the defendant stated that the parish foreman of the roads asked the witness to reserve some of the defendant's gravel for them to repair the roads with, and the witness stated that he had given gravel and brickbats for that purpose, and he also stated that he sent stuff from the depôt of the defendant, and that the parish paid nothing for it, and that the stuff so sent was laid about the road.

The Lord Chief Justice put the following questions to the jury:—1. Was there a hole in the highway? 2. Was the subsidence in consequence of the work of the defendant being defectively executed, or from natural causes? 3. Had the parish taken to the road, so as to relieve the defendant from any obligation to look after the work, and make good its subsequent defects? To

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which questions the jury answered:—1. That there was a hole in the highway. 2. That the hole was occasioned by natural subsidence. 3. That the parish had not taken to the road so as to relieve the defendant from the obligation of looking after the work, and making good its subsequent defects. The Chief Justice thereupon directed the verdict to be entered for the plaintiff, and the jury assessed the damages at 40*l.*, leave being reserved to move to enter the verdict for the defendant, or a nonsuit.

A rule was obtained accordingly, or for a new trial, on the grounds, first, that the evidence shewed that the defendant was not liable for the injury alleged in the declaration; secondly, that defendant, having properly restored and repaired the part of the highway where the accident complained of occurred, was not liable in repect of subsequent subsidence of the soil; thirdly, that the finding of the jury amounted to a verdict for the defendant.

The Court of Queen's Bench made the rule absolute to enter a nonsuit, on the ground that there was no liability imposed on the defendant by common law or statute to do more than properly reinstate the road, which the jury must be taken to have found had been done. (1)

Laxton, for the plaintiff. The defendant is liable at common law for the consequence of having left the highway in an improper state. It is found as a fact that subsidence often takes place as much as six months after an excavation like the present has been filled in, it was the defendant's duty, therefore, after opening and filling in the highway, to watch it and make good any subsidence. Secondly, there was a statutory obligation imposed on the defendant by 18 & 19 Vict. c. 120. Section 135 gives power to make sewers under any turnpike road or street; and by ss. 110, 111, any person authorized to open "a street" (which by the interpretation clause, s. 250, includes any highway or turnpike road), is bound to reinstate it without delay, and with proper materials; and from the finding of the jury, it must, no doubt, be taken that the defendant in the first instance did fill in the road with proper materials; but this is not enough, inasmuch as subsidence usually takes place.

[BYLES, J. The defendant's duty was at an end as soon as he

(1) Law Rep. 2 Q. B. 264.

had completed the work by properly filling in the trench with proper materials.]

Gray v. *Pullen* (1) is in point for the plaintiff.

[CHANNELL, B. No, it has no bearing on the present case; there ss. 110, 111 had not been complied with, and all this Court decided was, that as a statutable duty was imposed upon the defendant after opening a road to properly reinstate it, he could not get rid of his liability by having employed a contractor to do the work.]

The Court of Queen's Bench laid stress on s. 33 of 25 & 26 Vict. c. 102; but it is not applicable to anything but a turnpike road: it tends however to shew that persons breaking up the road are to make good any subsidence, and are therefore liable for the consequences of any omission to do so.

M. Chambers, Q.C. (*Philbrick* with him), for the defendant, was not heard.

KELLY, C.B. The defendant being a contractor under the Metropolitan Board of Works, as such contractor had the power to open a trench in a highway for the purpose of constructing a sewer, and had the duty imposed upon him of afterwards filling in the trench and reinstating the road. It appears that it was in or about May that the defendant commenced the work, and it was finished in August, and the surface of the road had then been properly reinstated and the top metalling put into its proper position; the accident occurred in the following February. On the finding of the jury coupled with the evidence, there can be no doubt that it was fully established that the hole had been properly and completely filled up; and on that, we must take it that the road had been reinstated in conformity with the requirements of s. 11. Looking at the question put by the Chief Justice, whether the subsidence was in consequence of the work of the defendant being defectively executed, or from natural causes, and the answer by the jury that the hole was occasioned by natural subsidence, we must take it that the jury negatived the defendant's work having been defectively executed. In other words, he had performed all the statute requires. The subsidence did not take place till some months after the defendant finished the work.

(1) 5 B. & S. 970; 34 L. J. (Q.B.) 265.

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Reliance was placed on the finding of the jury that the parish had not taken to the road so as to relieve the defendant from the obligation of looking after the work and making good its subsequent defects. But it is perfectly immaterial whether the parish had taken to the road or not; the defendant would have had no right to interfere with the road after he had completed the work; and if, as is clear he did, he had done that according to the requirements of the statute, his liability at once ceased; and the fact of the jury implying that he ought to look after the work to guard against subsequent subsidence simply amounts to this, that the jury were mistaken in the law. The plaintiff's counsel has been unable to bring forward any sections imposing any extraordinary liability on the defendant, besides ss. 110, 111, and as I have before observed, all that these sections require must be taken to have been done. No authority was given to the defendant to interfere with the road afterwards, and no obligation imposed to make good a subsidence which took place months after the work had been completed. We are therefore of opinion that the judgment of the Court of Queen's Bench was perfectly right and must be affirmed.

BRAMWELL, B. I am of the same opinion. I think the finding of the jury amounts to a finding, that the accident was the result of want of subsequent repairs, not of the improper filling up of the hole.

CHANNELL, B. The finding of the jury was, in fact, a finding for the defendant, unless there was an obligation imposed on him by the statutes to prevent or make good subsequent subsidence, after the trench had once been properly filled in and the road reinstated.

BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *Henry Levy.*
Attorney for defendant: *J. T. Moss.*

HARGREAVES AND ANOTHER *v.* ARMITAGE. 1868

Sheriff—Order of Release by Registrar of Bankruptcy Court—Bankruptcy Act, 1849 (12 & 13 *Vict. c.* 106), *s.* 27—*General Orders in Bankruptcy*, 1861, *Rule* 44. *Nov.* 27.

By the Bankruptcy Act, 1849, s. 27, any registrar of the court of bankruptcy may, during vacation, or during the illness or absence from any other reasonable cause of any commissioner, act as the deputy of such commissioner, with all the power of the court. By rule 44 of the general orders, made under s. 8, except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any commissioner, under s. 27, without the express request in writing of such or some other commissioner.

To an action for an escape, the sheriff pleaded that the debtor had been adjudged a bankrupt with protection while in the defendant's custody, and an order had been made by the registrar of the court of bankruptcy for the release of the debtor, and the defendant thereupon, acting bonâ fide and in obedience to the order, released the debtor. The plaintiff replied that the registrar had not been requested in writing by any commissioner to act for him, nor had any emergency arisen, nor the nature thereof been entered on the proceedings. On demurrer:—

Held, that, assuming the order could be set aside, it was voidable only and not void, and protected the sheriff, on the principle of *Lloyd* v. *Harrison* (Law Rep. 1 Q. B. 502).

DECLARATION, that the plaintiffs recovered judgment against one S. H. Brocklehurst, and issued a ca. sa. addressed and delivered to the defendant as the sheriff of Lancashire, that the defendant having arrested Brocklehurst voluntarily allowed him to escape.

Plea, that after the passing of the Bankruptcy Acts, 1849 and 1861, the defendant arrested Brocklehurst under the ca. sa. as alleged in the declaration, and detained him in execution as a prisoner for debt, at the suit of the plaintiffs; and while he was in defendant's custody Brocklehurst filed a petition, and was duly adjudged a bankrupt by the Manchester district court of bankruptcy; that he surrendered, and duly obtained his protection from arrest; and thereupon an order was duly made upon the defendant by the registrar of the said court, duly acting and having jurisdiction in that behalf, according to the bankruptcy laws, for the immediate release of Brocklehurst from the custody of the defendant; which order and the summons indorsed thereon are in the words and figures following:—"The Bankruptcy Act, 1861. In

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the court of bankruptcy at Manchester, 26th January, 1867. I certify that S. H. Brocklehurst, of &c., has this day been brought up before me by the within named H. Mapleston, in obedience to the within summons, and I did, upon the application of the solicitor of the said bankrupt, order his immediate release from the custody of the sheriff of the county of Lancaster, as to the present and all other detainers." (seal of the court)—(signed), "David C. Macrae, registrar." The summons indorsed was as follows:—"The Bankruptcy Act, 1861. In the court of bankruptcy for the district of Manchester. In the matter of S. H. Brocklehurst, by whom a petition for adjudication of bankruptcy has been filed. To Henry Mapleston, of &c., sheriff's officer. These are to will and require you to whom this summons is directed personally to appear before the registrar acting in the prosecution of the said petition, on Saturday, the 26th day of January instant, at one o'clock in the afternoon, in this court, there and then to be examined by virtue of the said petition and of the above mentioned act and bring with you the body of the said S. H. Brocklehurst. Given under my hand, and under the seal of the court, this 26th day of January, 1867. D. C. Macrae, registrar." That David C. Macrae, making and mentioned in the order and summons, was the registrar duly appointed under the Bankruptcy Acts in the said court, and had jurisdiction in the said matter, and Mapleston mentioned in the summons was the officer of the defendant, and as such was served with the summons. And the said registrar of the said bankruptcy court having jurisdiction in the matter aforesaid made the said order of discharge as aforesaid, and the defendant thereupon, acting bonâ fide and in obedience to the order, and believing the same to be binding on him in law, released Brocklehurst.

Replication, that Macrae, in making the order, assumed to act by virtue of s. 27 of the Bankruptcy Act, 1849 (1); and in pursuance of the powers contained in the Act, the following general order

(1) 12 & 13 Vict. c. 106, s. 27:—"That any registrar of the Court may, during vacation, or during the illness or absence from any other reasonable cause of any commissioner thereof, act for and as the deputy of such commissioner; and any such registrar so acting shall have and exercise all power vested in the Court, except the power of commitment, the hearing of any disputed adjudication, or the hearing or determining of any question of the allowance or suspension of any bankrupt's certificate."

[No. 44] was made on the 19th of October, 1852:—"Except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any commissioner under s. 27 without the express request in writing of such or some other commissioner." That in pursuance of the powers in the Bankruptcy Act, 1861, certain general orders were duly made, whereby it was provided that the above general order should be acted upon for the purposes mentioned in s. 45 of the Act of 1861; that Macrae had not, before making the order in the plea mentioned, been requested in writing by any commissioner of the said court to sit or act for him, nor had any case of emergency, as in the said general order of October 19, 1852, mentioned, arisen, nor had the nature of any such emergency been entered upon the proceedings in manner provided by the said general order.

Demurrers to the plea and to the replication, and joinder.

Murphy, for the plaintiffs. The sheriff being charged with an escape, justifies under an order of discharge made by the registrar of the district bankruptcy court, and the plaintiffs by their replication seek to shew this order is bad. By 12 & 13 Vict. c. 106, s. 112, the court may order the immediate discharge of the bankrupt if he be in prison or in custody for debt at the time of obtaining his protection; by s. 27, in vacation or during the illness or absence of the commissioner from any other reasonable cause, the registrar may act as his deputy, with the full power of the court, except in certain cases which do not include the present; by rule 44 of the orders of 1852 made under s. 8, except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act under s. 27 without express request in writing, and this order is kept on foot by r. 36 of the general orders of 1861. No doubt therefore in the present case the registrar, if an emergency had arisen, or if he had been requested in writing to act during the illness or reasonable absence of the commissioner, would have had power to order the debtor's discharge; but the emergency and request are both negatived by the replication. The order therefore is bad, and is no protection to the sheriff. In *Ex parte Morgan* (1), Lord Westbury, C., said, "It was

(1) 32 L. J. (Bkr.) 61, 62.

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essential not only that the order should be properly made, but that it should shew on the face of it that it was properly made. There was nothing on the record in this instance to shew that the commissioner was absent 'from illness or any other reasonable cause,' or that the registrar had been expressly requested in writing to act for him."

[LUSH, J. It is a very different question whether an order ought not to be set aside on appeal, and whether we ought to hold that this order was made without jurisdiction. The case of *Lloyd* v. *Harrison* (1) is not distinguishable in principle from the present case. The order is made by a judicial officer, and the sheriff has no means of knowing whether the order had been properly made or not.]

Holker, Q.C. (*Baylis* with him), for the defendant, was not heard.

LUSH, J. I think we must hold this order so far good as to afford the sheriff protection. By 12 & 13 Vict. c. 106, s. 27, the registrar in certain cases may act for the commissioner, and has all the power expressly given him that the commissioner has; he therefore has power in the absence of the commissioner to make an order of discharge. In the present case an order was made by the registrar and served on the sheriff's officer, and it is impossible for the sheriff to know whether the order is absolutely good or not. He must obey the order made by a competent authority; and it is no part of his duty to inquire, nor has he any means of ascertaining, whether the registrar on this particular occasion was authorized in writing by the commissioner. It is impossible for the sheriff to ascertain whether this general order has been complied with, which indeed may be taken as merely directory. The principle of *Lloyd* v. *Harrison* (1), as I have already observed, is directly applicable. Here is an instrument made by an official having jurisdiction in the matter, and the sheriff at his peril is bound to obey it; and there is nothing in the statutes enabling or obliging the sheriff to make inquiries. I think, therefore, this was an order the sheriff was bound to obey; and even if it can be set aside on appeal, supposing the facts stated in the replication to be true, it is voidable only and not void, and

(1) Law Rep. 1 Q. B. 502.

therefore protects the sheriff. There must therefore be judgment for the defendant.

HANNEN and HAYES, JJ., concurred.

Judgment for the defendant.

Attorney for plaintiffs: *W. Hunt, for F. C. Hulton, Manchester.*
Attorneys for defendant: *Gregory, Rowcliffes, & Co., for Marsland & Addleshaw, Manchester.*

WHITELEY, APPELLANT; CHAPPELL, RESPONDENT.

Nov. 28.

Personation at Election of Guardians of the Poor—"Person entitled to Vote"—14 & 15 Vict. c. 105, s. 3.

A man cannot be convicted, under 14 & 15 Vict. c. 105, s. 3, of personating "a person entitled to vote" at an election of guardians of the poor, if the person personated be dead at the time.

CASE stated by the stipendiary magistrate of Manchester, under 20 & 21 Vict. c. 43.

The following is the substance of the case:—

By 14 & 15 Vict. c. 105, s. 3, if any person, pending or after the election of any guardian [of the poor], shall wilfully, fraudulently, and with intent to affect the result of such election . . . . "personate any person entitled to vote at such election," he is made liable on conviction to imprisonment for not exceeding three months.

The appellant was charged with having personated one J. Marston, a person entitled to vote at an election of guardians for the township of Bradford; and it was proved that Marston was duly qualified as a ratepayer on the rate book to have voted at the election, but that he had died before the election. The appellant delivered to the person appointed to collect the voting papers a voting paper apparently duly signed by Marston.

The magistrate convicted the appellant.

The question for the Court was, whether the appellant was rightly convicted.

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Mellish, Q.C. (with him *McIntyre*), for the appellant. A dead person cannot be said to be "a person entitled to vote;" and the appellant therefore could not be guilty of personation under 14 & 15 Vict. c. 105, s. 3. Very possibly he was within the spirit, but he was not within the letter, of the enactment, and in order to bring a person within a penal enactment, both must concur. In Russell on Crimes (vol. ii. p. 1013, 4th ed., p. 541, 3rd ed.), under a former statute, in which the words were similar to those of 2 Wm. 4, c. 53, s. 49, which makes it a misdemeanor to personate "a person entitled or supposed to be entitled to any prize money," &c., *Brown's Case* (1) is cited, in which it was held that the personation must be of some person primâ facie entitled to prize money. In the Parliamentary Registration Act (6 Vict. c. 18), s. 83, the words are "any person who shall knowingly personate . . . any person whose name appears on the register of voters, whether such person be alive or dead;" but under the present enactment the person must be entitled, that is, could have voted himself.

Crompton, for the respondent. *Brown's Case* (1) is, in effect, overruled by the later cases of *Rex* v. *Martin*, and *Rex* v. *Cramp* (2), in which the judges decided that the offence of personating a person "supposed to be entitled" could be committed, although the person, to the knowledge or belief of the authorities, was dead. Those cases are directly in point. The gist of the offence is the fraudulently voting under another's name; the mischief is the same, whether the supposed voter be alive or dead; and the Court will put a liberal construction on such an enactment: *Reg.* v. *Hague.* (3)

Mellish, Q.C., in reply. "Supposed to be entitled" must have been held by the judges in the cases cited to mean supposed by the person personating.

LUSH, J. I do not think we can, without straining them, bring the case within the words of the enactment. The legislature has not used words wide enough to make the personation of a dead person an offence. The words "a person entitled to vote" can

(1) 2 East, P. C. 1007.
(2) Russ. & Ry. 324, 327.
(3) 33 L. J. (M.C.) 81; 4 B. & S. 715.

only mean, without a forced construction, a person who is entitled to vote at the time at which the personation takes place; in the present case, therefore, I feel bound to say the offence has not been committed. In the cases of *Rex* v. *Martin*, and *Rex* v. *Cramp* (1), the judges gave no reasons for their decision; they probably held that "supposed to be entitled" meant supposed by the person personating.

HANNEN, J. I regret that we are obliged to come to the conclusion that the offence charged was not proved; but it would be wrong to strain words to meet the justice of the present case, because it might make a precedent, and lead to dangerous consequences in other cases.

HAYES, J., concurred.

Judgment for the appellant.

Attorneys for appellant: *Dangerfield & Fraser.*

Attorneys for respondent: *E. K. Randell, for Cobbett, Wheeler, & Cobbett, Manchester.*

MAINWARING *v.* MILNER AND ANOTHER. *Nov.* 17.

Arrest on mesne process—Discharge of Bail by render to County Gaol—Form of Recognizance—11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 70, *s.* 21—1 *&* 2 *Vict. c.* 110, *ss.* 1, 3.

A capias under 1 & 2 Vict. c. 110, s. 3, is "mesne process" within 11 Geo. 4 & 1 Wm. 4, c. 70, s. 21; and where a defendant has been arrested and held to bail, the recognizance being to render to "the keeper of the Queen's Prison," the bail are discharged by a render to the gaol of the county in which the defendant was arrested.

DECLARATION, that defendants on the 25th of June, 1867, at Barnsley, in the county of York, came in their proper persons before a commissioner duly empowered to take recognizances of bail in and for the said county in any action or suit depending in this court, according to the form of the statute, and then and there became bail for one William Milner, and "undertook that if Milner should be condemned in an action of debt then pending in this court at the suit of the plaintiff, then Milner should

(1) Russ. & Ry. 324, 327.

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satisfy the costs and condemnation, or should render himself into the custody of the keeper of the Queen's Prison, or that the defendants would do it for him," which recognizance was duly enrolled in this court; that although the plaintiff recovered judgment in the action against Milner, yet he has not satisfied the plaintiff her damages, &c., nor rendered himself on that occasion into the custody of the keeper of the Queen's Prison, and to the said recognizance; that the plaintiff has not obtained any execution or satisfaction of her judgment, whereby an action hath accrued to the plaintiff for the amount of the judgment.

Plea, that Milner was held to bail on a writ of capias, issued under 1 & 2 Vict. c. 110, an Act for, amongst other things, abolishing arrest on mesne process in civil actions, except in certain cases, on the which Act he was arrested in the county of York; that on the occasion in the declaration mentioned, Milner in due time rendered himself to the common gaol of the said county in which he was so arrested, according to the form of the statute in such case made and provided.

Demurrer and joinder.

Ryalls, in support of the demurrer. An arrest on a capias, under 1 & 2 Vict. c. 110, s. 3, is not arrest on "mesne process" within the meaning of 11 Geo. 4 & 1 Wm. 4, c. 70, s. 21. (1) Mesne process meant by that statute was process by which the action was commenced; the arrest under 1 & 2 Vict. c. 110, is a collateral proceeding of a totally different character: *Ireland* v. *Berry*. (2) In *Brown* v. *M'Millan* (3), it was held that a capias under 1 & 2 Vict. c. 110, might be issued into a county palatine, indorsed for less than 50*l*., although 7 & 8 Geo. 4, c. 71, s. 7, enacts that "no sheriff, within the counties palatine shall, upon any mesne process issuing out of any of the superior courts, arrest or hold

(1) 11 Geo. 4 & 1 Wm. 4, c. 70, s. 21:—"A defendant who shall have been held to bail upon any mesne process issued out of any of the superior courts of record, may be rendered in discharge of his bail, either to the prison of the court out of which such process issued, according to the practice of such court, or to the common gaol of the county in which he was so arrested," and the render shall be in manner following, ... &c.; and on such render so perfected, the said bail shall be wholly exonerated from liability as such.

(2) 5 Q. B. 551; 1 D. & L. 866.

(3) 7 M. & W. 196.

any person to special bail, unless such process shall be indorsed for a sum not less than 50*l*." In the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), s. 198, this process is not called mesne process, but such process as may be had by writ or warrant against a debtor about to depart out of England.

[*Forbes*, contra, pointed out that Rule 106 of Hil. T., 1853, expressly recognized the practice under 11 Geo. 4 & Wm. 4, c. 70, s. 21, as still existing, notwithstanding 1 & 2 Vict. c. 110, and the rule could only apply to the process under s. 3 of the latter Act.]

Secondly, if this be mesne process, the recognizance was not in the alternative, but absolutely to render to the Queen's Prison, and therefore the bail were not discharged by the render to another prison.

[HANNEN, J. The form is never in the alternative; the statute says, the render to the gaol of the county where the debtor was arrested shall be a good render and discharge the bail.

LUSH, J. The Queen's Prison is no longer the prison of this court, since 25 & 26 Vict. c. 104, but Whitecross Street prison is substituted. (1)]

Forbes, for the defendant, was not heard.

LUSH, J. I believe I may say with some confidence that since the passing of 1 & 2 Vict. c. 110, it has never been doubted that the 11 Geo. 4 & 1 Wm. 4, c. 70, still remained in full force, and that a capias to hold to bail under s. 3 of the Statute of Victoria is mesne process within s. 21 of the other act. The rule of Court which has been cited (Rule 106, Hil. T., 1853) shews this. And why should it not be so? The section (21) provides for giving facilities for the bail to render a defendant, who has been held to bail upon any mesne process, to the gaol of the county in which he has been arrested, instead of to the prison of the Queen's Bench, or other court in which the action is brought; and the term "mesne process" is used in the sense which is equally applicable

(1) Since 25 & 26 Vict. c. 109, the form of recognizance of bail is to render to the keeper of Whitecross Street prison: see Chitty's Forms, 10th ed. pp. 425, 448.

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to the capias under 1 & 2 Vict. c. 110, as to the capias which, formally, was the commencement of the action. It is mesne process in the proper sense, that it is preliminary and not final process. Assuming, therefore, the recognizance to have been properly framed, the rendering of the defendant to the county gaol was a good discharge of the bail. Secondly: I think it is a good discharge as this recognizance is framed. I do not mean to say that the recognizance might not have been more correctly drawn, but we must read it so as to give effect to the intention and present practice in such cases. Now, in the first place, the Queen's Prison is no longer the prison of this Court, but the Whitecross Street prison; but every prison is, in one sense, the Queen's Prison, and we must read the recognizance as meaning that the defendant will render himself to such one of the Queen's prisons as by law will be a good surrender according as he be arrested in Middlesex or some other county. The plea shews that Milner did surrender to the keeper of the York county gaol, in which county he had been arrested, and the plea therefore shews a good render. The defendants are consequently entitled to judgment.

HANNEN, J. I am of the same opinion. What have the bail undertaken should be done? That Milner should surrender himself to the custody of the keeper of the Queen's Prison; but by 11 Geo. 4 & 1 Wm. 4, c. 70, s. 21, a defendant who has been held to bail upon any mesne process of one of the superior courts may be rendered in discharge of his bail either to the prison of the court out of which the process issued, according to the practice of the court, or to the common gaol of the county in which he was arrested. The form of the recognizance is never in the alternative, and I think when it mentions the Queen's Prison it must be taken to mean that he will surrender to such prison as by law is substituted for the Queen's Prison. That being so, the only question is, was this arrest on "mesne process"? Beyond all doubt it was. If there could be any doubt in the matter, it is removed by the language of the statute itself, 1 & 2 Vict. c. 110, s. 1, which abolishes arrest on mesne process, except in cases thereinafter provided, and then by s. 3 introduces this arrest by order of a judge. This arrest therefore, though in a modi-

fied form, is arrest on "mesne process," which is clearly used in the sense of any process which is not final process.

HAYES, J. I entirely concur. This is plainly mesne process, because it is not final process; and the render has been made in the way which the statute says should be a discharge of the bail, viz., to the gaol of the county in which the debtor was arrested.

Judgment for the defendants.

Attorney for plaintiff: *Hickin.*
Attorneys for defendants: *Singleton & Tattershall.*

IN RE SULLIVAN *v.* PEARSON. EX PARTE MORRISON.

Nov. 24.

Attorney—Lien on Damages for Costs—Compromise of Action without Attorney's Knowledge.

The plaintiff recovered a verdict for 25*l.* against the defendant for personal injuries caused by the negligence of the defendant's servants. The plaintiff's attorney informed the defendant's attorney that he had a large claim against the plaintiff for costs, and had a lien for the same upon the damages recovered in the action. Subsequently, a rule nisi for a new trial was granted on the ground that the verdict was against evidence. The plaintiff and defendant, without the knowledge of their respective attorneys, settled the action, the defendant paying 10*l.* to the plaintiff, who was in great poverty, in discharge of all claims for damages and costs:—

Held, on an application by the plaintiff's attorney that his costs should be paid by the defendant, that the plaintiff's attorney was not entitled to compel the defendant to pay his costs, as the result of the proceedings was doubtful at the time of the settlement, and there was, therefore, no existing fund or security upon which any lien for the attorney's costs had attached, and as the settlement was not shewn to be fraudulent.

RULE calling on the plaintiff and the defendant to shew cause why they, or one of them, should not pay Morrison, the plaintiff's attorney, his costs in this action.

The plaintiff, a costermonger, brought an action against the defendant for personal injury sustained by the plaintiff through the negligence of the defendant's servants. John Morrison, who obtained this rule, was his attorney in the action.

The action was tried before Cockburn, C.J., at Guildhall, on the

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26th of February, 1868, and a verdict was found for the plaintiff for 25*l.*

A summons to stay execution was subsequently taken out by the defendant, and was dismissed. At this time Morrison had a claim of nearly 100*l.* against the plaintiff for the costs of this action, of which 30*l.* or 40*l.* were costs out of pocket. Morrison had besides lent to the plaintiff, who was in very indigent circumstances, several small sums during the progress of the litigation.

In March and April, 1868, Morrison several times saw the defendant's attorney, and told him that he was a very large sum out of pocket for payment of counsel's fees and witnesses, and that he had a lien for the same and his other costs on the damages recovered in the action. On the 17th of April, Morrison delivered at the offices of the defendant's attorney a copy of his bill of costs, amounting to nearly 100*l.* On the same day the defendant obtained a rule nisi to set aside the verdict on the ground that it was against evidence.

On the 10th of August, the defendant, without the knowledge of Morrison, or of his own attorney, settled the action by paying to the plaintiff 10*l.*, for which the plaintiff gave a written receipt acknowledging that the money was received "in settlement of the action for personal injury and solicitor's charges, in full discharge of all demands."

On the 20th of August, Morrison wrote to the defendant's attorney, giving him a formal notice that he had a lien for his costs on the amount of damages recovered in the action.

On the 4th of September, Morrison took out a summons calling on the defendant to pay his costs. No order was made on this summons, and Morrison then obtained this rule.

Hance (*Serjeant Ballantine* with him) shewed cause for the defendant. (1) This rule ought to be discharged,—first, because the compromise was not fraudulent; secondly, because Morrison had no lien for his costs, as there was no certain fund out of which they were payable, and it was doubtful whether there ever would be such a fund. The compromise was most reasonable. It was for the advantage of both plaintiff and defendant that the action

(1) In the Bail Court, before Blackburn and Hayes, JJ.

should be settled, and the terms of the settlement were advantageous to both parties. There is nothing to shew fraud, and the Court therefore will not interfere, as it will not lend its assistance, "except when it is clearly shewn that the plaintiff and the defendant have colluded and conspired together to defraud the attorney": *Clark* v. *Smith.* (1)

Secondly, the plaintiff, in making the compromise, only exercised his legal right. The action had not terminated in the plaintiff's favour; but the result was still doubtful. The Court never grants a rule nisi on the ground that the verdict is against the weight of evidence, unless it is very dissatisfied with the verdict, especially where, as here, the verdict is for a small amount. The proceedings therefore had not terminated in the plaintiff's favour, and there was no fund upon which the lien of the plaintiff's attorney could attach. There was only the chance of a fund. The plaintiff was dominus litis, and might properly compromise the suit. His attorney has no right to interfere and stop that arrangement on the ground of some supposed inchoate right he may have in the subject matter of the suit, or of the chance he has of obtaining costs from the defendant if the suit terminate in the plaintiff's favour: *Quested* v. *Callis.* (2) The lien which an attorney is said to have upon a judgment is merely a claim to the equitable interference of the Court: *Barker* v. *Quintin* (3); and the Court cannot exercise this equitable jurisdiction, unless there exists some fund or security to be protected for the attorney's benefit.

W. Willis in support of the rule. There was fraud, in fact, here. The defendant, knowing of the claim of the plaintiff's attorney, took advantage of the plaintiff's poverty to induce him to accept a very insufficient sum by way of compromise. The plaintiff would not so easily have compromised if he had not thereby got the money directly into his own hands without the intervention of his attorney. The plaintiff in doing this was really dealing with rights the fruits of which did not belong to him, but belonged to his attorney. The real object of the arrangement was to deprive the attorney of his costs, and the arrangement was therefore fraudulent. The result of the compromise is, that the plaintiff's

(1) 6 M. & Gr. 1051, 1053. (2) 10 M. & W. 18, 20.
(3) 12 M. & W. 441, 451.

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attorney has lost every farthing of the money he has paid in the suit, and also all his labour. The plaintiff cannot be considered in all respects dominus litis after the verdict. The suit has thereby terminated in his favour, and the Court will not assume that it will be set aside, and if set aside that a new trial will produce a different result. In *Ex parte Games* (1), the Court ordered the defendant to pay the costs of the plaintiff's attorney, when the plaintiff in collusion with the defendant refused to allow execution to issue on a judgment for costs obtained by the plaintiff against the defendant. In *Brunsdon* v. *Allard* (2) it is said "if a conspiracy between the plaintiff and the defendant to defraud the attorney of his costs is clearly made out, the Court will interfere to prevent it." In *Gould* v. *Davis* (3) an action for a debt was compromised before trial by the defendant giving to a third person a promissory note to be held for the plaintiff until it was due. It was held that the plaintiff's attorney was entitled to the note to satisfy his claim for costs. See also Archbold's Practice, 11th ed. p. 137.

BLACKBURN, J. I think in this case the rule must be discharged. There is no doubt at all that where an attorney has by his labour or his money obtained a judgment for his client, he has a lien upon the proceeds of such judgment, and is entitled to have its proceeds pass through his hands. The lien does not amount to an equitable assignment of the proceeds of the judgment, but it is yet protected by the Court. Whether there has been an actual judgment, or whether the fruits of the litigation have been obtained without a judgment, if an arrangement is made to prevent the attorney from reaping the benefit of his lien, the Court may set aside such an arrangement, or may force the parties who have so deprived the attorney, to pay the costs for which the attorney had the lien. It is not necessary to define what would be a proper case for the interference of the Court. If a judgment were obtained, or a debt ascertained to be due, and an agreement were made to give the plaintiff more than he could get in the ordinary course, there would probably be a case for the interference of the Court. Other

(1) 3 H. & C. 294; 33 L. J. (Ex.) 317.

(2) 2 E. & E. 19, 27; 28 L. J. (Q.B.) 306, 309.

(3) 1 C. & J. 415.

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cases might be suggested. These are cases where the fruits of the litigation have been substantially obtained. I do not think that the fact that judgment has or has not been signed is conclusive on the point. In *Ex parte Games* (1), the plaintiff, after declaration, gave the defendant a release of the cause of action. The release was pleaded. The replication confessed the plea and prayed judgment for costs. Judgment for costs was afterwards signed, and a writ of execution issued, but the plaintiff, in collusion with the defendant, refused to allow the execution to be enforced. The question was whether the Court would compel the defendant to pay the costs of the plaintiff's attorney. It was held that there was a proper case made out for the interference of the Court, and that an order calling on the plaintiff "or the defendant" to pay the costs was properly made. I do not say that when there is a clean verdict, although no formal judgment, the case may not be the same. The Court might look at it in the same light as if judgment had been signed. It would, however, be difficult to prove a fraudulent agreement between the parties during the progress of the litigation where there is no ascertained debt. No case has yet gone so far. When there is an agreed debt ascertained by the exertions of the attorney, as in *Gould* v. *Davies* (2), the attorney may sometimes claim the assistance of the Court to protect his rights. In *Gould* v. *Davies* (2) there was an agreement, without the intervention of the attorneys, between the plaintiff, a pauper, and the defendant, to settle the action, which was for a debt of 25*l.*, the defendant giving the plaintiff a bill of exchange for 24*l.*, which was to remain in the hands of a third person till it was due. The Court held that the bill must be given up to the attorney.

In the present case it is admitted that the plaintiff is a pauper who cannot pay his attorney. There was a verdict for the plaintiff for 25*l.*, and a rule nisi was obtained by the defendant to set aside the verdict on the ground that it was against evidence. According to the ordinary practice this rule would not have been granted without consulting the learned judge who tried the action, nor unless he were dissatisfied with the verdict. When the verdict is for so small a sum as 25*l.*, the Court is usually very unwilling to grant a new trial. There is, therefore, every reason to believe that the

(1) 3 H. & C. 294; 33 L. J. (Ex.) 317. (2) 1 C. & J. 415.

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verdict was unsatisfactory. It was, therefore, doubtful whether the litigation would in the end be successful. At the time of the compromise it was far from being so. The case, then, seems to fall within that class of cases where the compromise is made while the litigation is going on, and it has not reached a successful issue. The case was in fact in a stage of expense; there was no actual fraud; the plaintiff really wanted the money, and the defendant being sued by a pauper might well give 10*l.* to save the expense of a new trial. It was not necessarily collusive. This is an application to the equitable jurisdiction of the Court, and when an arrangement is made to deprive an attorney of the fruits already obtained in the litigation, and thus to deprive him of all remuneration, this jurisdiction will be put in force. But this is not the case here. The attorney has no claim unless the law be that where litigation is once commenced by a pauper the attorney has a right to insist on the action being continued to judgment. But this is not the law, and it would be more satisfactory if attorneys relied rather upon their clients' ability to pay them than upon the chance of obtaining their costs from the other side as the result of the litigation.

HAYES, J. I am of the same opinion. We should be going beyond any decided case if we granted this rule. The substantial ground of the application is, that the attorney has been deprived of his costs by the compromise between the plaintiff and the defendant; but, in fact, the costs from the defendant to the plaintiff were in doubt. The plaintiff was indebted to his attorney, but the defendant was not. There was no certainty as to the result. The Court never grants a rule for a new trial in a case like this, unless there are strong grounds for a new trial. We cannot say we are depriving the attorney of his costs when it was quite uncertain whether costs would be obtained from the defendant.

Rule discharged with costs.

Morrison in person.

Attorney for defendant: *Thomas Moss.*

PHILLIPS *v.* CALDCLEUGH AND ANOTHER.

1868
Nov. 26.

Vendor and Purchaser—Conditions of Sale, as to Title.

The plaintiff contracted to purchase of the defendants a house described as a "freehold" residence, &c.,—being lot 2 referred to in the particulars—subject to certain conditions of sale, and paid the deposit. Condition 5: "The abstract of title to lots 1, 2, and 3 (being the freehold portion of the property), will commence with a conveyance of the 17th of April, 1860, and no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract." 9. "If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale; but shall entitle the purchaser to compensation." The abstract of the deed of the 17th of April, 1860, recited an indenture of the 2nd of March, 1850, whereby E. assigned to R. in fee, and another deed whereby R. assigned to certain trustees in fee, and by the deed the trustees conveyed to the defendants' testator in fee, subject (so far as the premises were subject thereto), to the covenants and conditions on the part of the grantee, his heirs and assigns, in the said indenture of the 2nd of March, 1850. The plaintiff refused to complete the purchase without further explanation of what these covenants and conditions were, and the defendants refused any further abstract, relying on the 5th and 9th conditions:—

Held, that the property having been sold as "freehold," the plaintiff was entitled to have an unencumbered freehold title under the deed of the 17th of April, 1860; and the 5th and 9th conditions did not protect the defendants; and the plaintiff was therefore entitled to rescind the contract and recover the deposit, &c.

DECLARATION, that the plaintiff and defendants agreed that the plaintiff should purchase of the defendants and the defendants should sell a house described as a freehold residence on certain conditions of sale (setting them out); that the plaintiff paid a deposit, but the defendants could not make out a title according to the conditions, claiming the deposit and the expenses incurred in investigating the title, &c.

Plea, inter alia, that the defendants did make out a title according to the conditions.

A case was stated, of which the following are the parts material to the point argued.

On the 5th of April, 1867, the plaintiff and the defendants entered into a written contract for the purchase by the plaintiff from the defendants of a house, described as a freehold residence, being lot 2 referred to in the particulars and conditions of sale, for 600*l.*, subject to certain conditions of sale; and paid a deposit of 120*l.*

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Among the conditions of sale were—5. The abstract of title to lots 1, 2, and 3 (being the freehold portion of the property), will commence with a conveyance dated the 17th of April, 1860, and no purchaser shall investigate, or take objection in respect of the title prior to the commencement of the abstract.—9. If any error or misstatement shall appear to have been made in the particulars of sale, such error or misstatement is not to annul the sale or entitle the purchaser to be discharged from the purchase, but a compensation is to be made to or by the purchaser, as the case may be, and the amount of such compensation to be fixed by the auctioneer.—10. If any purchaser shall fail to comply with the above conditions, his deposit shall be forfeited to the vendor, who shall be entitled to resell, &c.

The abstract delivered was of an indenture of the 17th of April, 1860, between W. T. Riley, A. B. Cockrane, and W. Pearson of the one part, and E. Mathews and George Beckett of the other part; reciting, inter alia, an indenture of the 2nd of March, 1850, whereby R. Edmunds assigned unto E. Richards, in fee, several messuages or tenements, with their appurtenances; and reciting a deed under the sanction of the court of bankruptcy, whereby Richards assigned the same to Riley, Cockrane, and Pearson, in fee, as trustees of sale for the benefit of Richards' creditors; and reciting that Riley, Cockrane, and Pearson had, as such trustees, contracted to sell to Mathews and Beckett the hereditaments described in the schedule, in fee, subject (so far as the same premises were subject thereto) to the covenants and conditions on the part of the grantee, his heirs and assigns, in the said indenture of the 2nd of March, 1850, and to the payment of the apportioned rent-charge in lieu of tithes, but free from all other incumbrances. And it was witnessed that Riley, Cockrane, and Pearson, in execution of the trust, did convey the hereditaments following, to Mathews and Beckett, and their heirs, subject to the covenants and conditions in the said indenture of the 2nd of March, 1850, contained, so far as they relate to part of the hereditaments, and subject to the said covenants and conditions as to the other part.

The abstract then set out mesne assignments by which the house in question came to the defendants, under the will of Edward Mathews.

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The plaintiff made, inter alia, the following requisition: "The vendors must shew, notwithstanding any of the conditions of sale, that the covenants and conditions contained in an indenture dated the 2nd of March, 1850, and referred to in the first abstracted deed, do not in any manner affect the property comprised in lot 2, and that the purchaser incurs no liability in respect of them." To which the defendants made answer: "The purchaser's solicitors are referred to the 5th condition of sale."

Further correspondence ensued, but no further abstract was delivered by the defendants, on which the plaintiff refused to complete the purchase, and the defendants resold the property.

The plaintiff then brought this action to recover the deposit and expenses of investigating title, with interest, &c.

The question for the Court was, whether the plaintiff was entitled to recover.

Joshua Williams, Q.C. (with him *R. B. Steele*), for the plaintiff. The case scarcely admits of argument. The plaintiff purchased a "freehold," that is an unencumbered freehold. By the 5th condition the abstract of title is to commence with the deed of the 17th of April, 1860, but that deed shews a freehold encumbered with some covenants or other, which the defendants refused to give any account of. The plaintiff was clearly not bound to accept this title.

THE COURT then called upon

Dowdeswell, Q.C. (*Raymond* with him), for the defendants. By the 5th condition the plaintiff was not entitled to any other title than was conveyed by the deed of the 17th of April, 1860: *Spratt* v. *Jeffery*. (1)

[LUSH, J. The plaintiff here purchased a "freehold," which means free of all encumbrances. In that case the plaintiff agreed to purchase the premises "as the defendant held them."]

What other effect can be given to the 5th condition than that the purchaser should take such title as the deed of 1860 conveyed? *Corrall* v. *Cattell* (2), and *Hanks* v. *Palling* (3), shew that, under conditions like the present, the purchaser must be taken to purchase such a title as the vendor can give, without inquiry beyond

(1) 10 B. & C. 249. (2) 4 M. & W. 734. (3) 6 E. & B. 659; 25 L. J. (Q.B.) 375.

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the commencement of the abstract. At the most, the existence of the covenant only amounted to an error of description to be compensated for under the 9th condition.

LUSH, J. I am clearly of opinion that our judgment must be for the plaintiff. The defendants might have protected themselves as in *Spratt* v. *Jeffery*. (1) Unfortunately they have not framed their conditions so as to guard against the mischief they intended to guard against. If there had been no conditions of sale, the purchaser would have been entitled to an abstract shewing an unencumbered freehold title for, at least, forty years, if not sixty years. And the question is, how far this right is qualified by the conditions of sale? [The learned judge read the 5th condition.] That restricts the inquiry, instead of the forty or sixty years, to the deed of the 17th of April, 1860. But the plaintiff is entitled to have a clear freehold title shewn on that conveyance, just as he would, but for the condition, have been entitled to have shewn an unencumbered freehold title for forty years. The 5th condition therefore does not afford the defendants any protection; neither does the 9th condition, for the objection to the title is not such an error or misstatement as would come within the meaning of the 9th condition. The indenture of the 17th of April, 1860, shews that the house is subject to some covenants or conditions, without intimating what they are. And it shews, therefore, not such a title to a freehold house as the particulars describe it, but a freehold encumbered by a covenant. And even if this encumbrance might be such an error only as could have been compensated for under the 9th condition, it is not shewn what the covenant is. I think, therefore, without in the slightest degree trenching on the decision in *Spratt* v. *Jeffery* (1), or any other of the cases cited, our judgment ought to be for the plaintiff. The plaintiff, by his objection, was not requiring proof beyond the limited time, but he objected that the title shewn without further explanation was not a freehold title at all. The condition was not that the purchaser should take such a title as the deed of 1860 shewed, but only cuts down the right of the purchaser to the inquiry as to a freehold title beyond the date of the deed of 1860.

(1) 10 B. & C. 249.

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HANNEN, J. I am of the same opinion. The question turns on the construction of the 5th condition of sale; and, as it seems to me, the objection taken by the plaintiff does not come within the language or meaning of that condition. The plaintiff was not seeking to investigate the defendants' title prior to the commencement of the abstract, but the objection simply amounts to an inquiry, what is the title conveyed by the deed, as I purchased a freehold house, and this appears to be encumbered by a covenant; and it is necessary, in order that I may know whether I have a title that I can accept, that it should be clearly understood what the covenants are by which the abstract shews that the property is bound.

Judgment for the plaintiff.

Attorneys for plaintiff: *Gold & Son.*
Attorney for defendants: *W. R. Greenwood.*

THE NORTH EASTERN RAILWAY COMPANY, APPELLANTS; THE LOCAL BOARD FOR THE DISTRICT OF SCARBOROUGH, RESPONDENTS.

Nov. 28.

Local Government Act, 1858 (21 & 22 *Vict. c.* 98), *ss.* 55, 56—*General District Rates—Union Assessment Committee Act*, 1862 (25 & 26 *Vict. c.* 103), *s.* 28.

By s. 55 of the Local Government Act, 1858, the general district rates shall be assessed upon the full net annual value of all property assessable to the poor-rate ascertained by the poor-rate made next before the making of the assessment; by s. 56, if there is no such assessment for the relief of the poor, or if such assessment is, in the judgment of the local board, an unfit criterion for making a general district rate, the local board may have a valuation made by which the value of the property shall be ascertained. By the Union Assessment Committee Act, 1862, s. 28, in every parish where a valuation list has been approved and delivered to the overseers, no poor-rate, or other rate which by law is required to be based on the poor-rate, shall be of any force, unless the property rated in it be rated according to the value appearing on such valuation list:—

Held, that general district rates were not "required" to be based on the poor-rate by reason of the option given to the local board by s. 56 of the former act; and, therefore, that they were not within s. 28 of the latter act, but might still be based on a valuation made by order of the local board, if in their judgment the poor law valuation list was an unfit criterion for making them.

CASE stated under 12 & 13 Vict. c. 45, on appeal to quarter sessions, against two general district rates made by the respondents,

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NORTH EASTERN RAILWAY CO. v. SCARBOROUGH LOCAL BOARD.

the Local Board for the district of Scarborough, duly constituted under the Public Health Act, 1848 (11 & 12 Vict. c. 63), and the Local Government Act, 1858 (21 & 22 Vict. c. 98). (1)

The district of Scarborough is co-extensive with the borough and parish of Scarborough. The parish of Scarborough consists of the township of Scarborough and the township of Falsgrave, both in the same union, and each separately maintaining its own poor, and in each of which there had been a valuation list made and approved and delivered to the overseers under the Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103), before the district rates in question were made; but these assessments being, in the judgment of the respondents, an unfit criterion for making a general district rate, the respondents made and assessed the property rated in each of the rates according to valuation lists made by their direction. (2)

In each of these rates property of the respondents was rated according to the respondents' valuation lists.

Maule, Q.C. (with him *A. W. Simpson*), for the appellants, con-

(1) By 11 & 12 Vict. c. 63, s. 88, "the special and general district rates shall be made and levied upon the occupier of all such kinds of property as by the laws in force for the time being are or may be assessable to any rate for the relief of the poor, and shall be assessed upon the full net annual value of such property, ascertained by the rate (if any) for the relief of the poor, made next before the making of the respective assessments under this act," &c. This section is repealed by s. 55 of 21 & 22 Vict. c. 98, but this part of it is re-enacted as to general district rates; and by s. 56, "if there is no such assessment as aforesaid for the relief of the poor, by reference to which such net annual value can be estimated, or if such assessment is, in the judgment of the local board, an unfit criterion for making a general district rate, a valuation shall be made by a person appointed by the local board for that purpose, in manner, as near as circumstances will permit, prescribed by 6 & 7 Wm. 4, c. 96, or any other act for the time being in force for regulating parochial assessments; and the net annual value of the property shall be ascertained by reference to the said valuation and assessment."

(2) The Union Assessment Committee Act, 1862 (25 & 26 Vict. c. 103, s. 28:—"In every parish where a valuation list under this act has been approved and delivered to the overseers, no rate for the relief of the poor, or other rate which is by law required to be based upon the poor-rate, shall be of any force, unless the hereditaments included in such rate . . . be rated according to the annual rateable value thereof appearing in the valuation list in force in the parish," &c.

tended that the rates were bad, as they must now be based on the valuation lists made under 25 & 26 Vict. c. 103, inasmuch as s. 28 of that Act enacts that no rates required to be based on the poor-rate shall be of any force unless the property in it be rated according to the valuation list in force in the parish. And he pointed out various anomalies and inequalities which might arise from holding otherwise.

Manisty, Q.C. (with him *Woodall*), for the respondents, was not called upon.

LUSH, J. I am of opinion that, as to the general mode of assessing the property, these rates are valid. The option given to the local board by s. 56 of 21 & 22 Vict. c. 98, is expressly substituted for the imperative enactment of s. 88 of 11 & 12 Vict. c. 63, which certainly "required" both the special and general district rates to be based on the poor-rate of the parish. The 25 & 26 Vict. c. 103, s. 28, only makes the valuation list the basis of all rates which are "required" by law to be based on the poor-rate; the option of the local board is not repealed, and it cannot be said that these general rates are "required" to be based on the poor-rate. It may possibly be cause of regret that the legislature has not thought proper to include these rates, but the enactment is certainly not wide enough to include them; for as long as the local board may at their option either adopt the poor-rate valuation as the basis of their rates, or use a valuation of their own, it cannot be said that their rates are "required" to be based on the poor-rate. Therefore I am clearly of opinion that, as to this ground of appeal, the rates are valid. (1)

HANNEN and HAYES, JJ., concurred.

Judgment for the respondents.

Attorneys for appellants: *Shum & Crossman, for Newton, Robinson, & Brown, York.*

Attorneys for respondents: *Edwards, Layton, & Jaques.*

(1) There were other points raised as to the rating of the railway as to which there was no contest on the law.

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Nov. 28.

YOUNG, Appellant; GRATTRIDGE, Respondent.

Nuisances Removal Act, 1863 (26 & 27 *Vict.* c. 117), *ss.* 2, 3—*Carcases deposited in any "place" for the purpose of being prepared for Sale as Food of Man.*

By the Nuisances Removal Act, 1863, s. 2, the inspector of nuisances may at all reasonable times inspect "any animal, carcase, &c., exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man," and if it appear to a justice that it is unfit for food, he may order it to be destroyed; and the person, in whose possession, or on whose premises the carcase was found, is liable to a fine of 20*l.*, or to be imprisoned for a term not exceeding three months, at the discretion of the justice; by s. 3, if any person prevent the inspector "from entering any slaughter-house, shop, building, market, or other place," where such carcase, &c., is kept for sale or preparation for sale, he is liable to a penalty of 5*l.*

Two carcases of cows, unfit for food, were found in a yard at the back of a butcher's house, there being a slaughter-house on one side of the yard:—

Held, that the yard was a "place" within the meaning of the Act.

Case stated under 20 & 21 Vict. c. 43, by Justices of Derby.

An information was laid against the appellant by the respondent, the inspector of nuisances of the Local Board of Health of Derby, under 26 & 27 Vict. c. 117, charging that he, the appellant, on, &c., at, &c., had in his possession on his premises there the carcases of two cows, which were then deposited there for the purpose of preparation for sale, and were then and there intended for the food of man, and which said carcases being then and there inspected and examined by the respondent, and appearing to him to be unfit for the food of man, were then and there seized by him and carried before justices, by whom the same were ordered to be destroyed and disposed of, so as to prevent their being used for such food.

On the hearing of the information it was proved that the appellant was a butcher carrying on a considerable business at his shop near the centre of the town of Derby, but residing at and occupying a house and some land on the outskirts, and nearly a mile distant from his shop. One of the buildings adjoining, and within the curtilage or yard of his dwelling-house was a slaughter-house, in which he was accustomed to slaughter, dress, and prepare for sale the cattle and meat required by him in his business of a butcher; on the same premises, and at a distance from any building, and

also within the curtilage of the house, there was a large copper or boiler in the open air, wherein it was alleged that the appellant was in the habit of boiling refuse meat for feeding his pigs. Evidence was given that there were pigstyes on the premises, but it did not appear whether any pigs were kept there or not. One of the witnesses for the prosecution admitted that he had once or twice seen the copper in use for boiling meat apparently for the purpose of feeding pigs; and one of the appellant's witnesses stated that he also had once seen the coppér in use for a similar purpose.

It was proved that one of the carcases referred to in the information was brought into the appellant's yard at about half-past six o'clock in the morning, in a cart driven by a servant of the appellant, and neatly covered up with straw, so as not to be seen; that the other carcase was brought into the same yard in like manner in another cart, being also neatly covered with straw, immediately afterwards. The appellant's servant who drove the last cart being watched by the police, took a circuitous route, but eventually drove the cart into the appellant's yard. The animals were dead when taken into the appellant's yard, and had apparently been slaughtered within a few hours, the flesh being warm. Both cows had suffered from pleuro-pneumonia, and were in such a state as to be unfit for human food, although fit for feeding pigs. The carcases remained there watched by the police, who had followed the first cart into the yard, until the arrival of the inspector of nuisances, who found the carcases (unskinned) lying on the ground in the appellant's yard, within a very short distance from the large copper or boiler before mentioned, and at a somewat greater distance from the slaughter-house or other buildings.

Upon these facts it was contended for the appellant, that the offence contemplated by 26 & 27 Vict. c. 117, s. 2 (1), and with

(1) 26 & 27 Vict. c. 117, after reciting that the provisions of the Nuisances Removal Act, 1855 (18 & 19 Vict. c. 121), with regard to the inspection and seizure of diseased and unwholesome meat, are defective, and that more effectual provisions should be substituted, by s. 1, repeals s. 26 of the recited Act.

s. 2. The medical officer of health or inspector of nuisances may, at all reasonable times, inspect and examine any animal, carcase, meat, poultry, game, flesh, fruit, vegetables, corn, bread, or flour, exposed for sale, or deposited in any place for the purpose of sale or of preparation for sale, and intended for

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which the appellant was charged, consisted, not in the mere possession of diseased meat, but in having the same deposited in a place, such as a slaughter-house or building, where it could be conveniently prepared for sale as human food. In support of this view s. 3 was referred to, and it was contended that the word "place" in s. 2 was used in the same sense as in s. 3, and hence that the place where the carcases were found and seized by the inspector not being ejusdem generis with slaughter-house, shop, building, or market, the case against the appellant failed.

The justices overruled this objection, and convicted the appellant, and ordered him to be imprisoned for one calendar month.

If the Court should be of opinion that the place where the carcases were found is a place where the inspector of nuisances is entitled under 26 & 27 Vict. c. 117, s. 2, to inspect and seize carcases deposited for sale for human food, then the conviction was to stand, otherwise to be quashed.

Lawrance, for the appellant, urged the argument used before the justices.

Cave, for the respondent, was not heard.

LUSH, J. I am of opinion that this yard was "a place" within

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the food of man, the proof that the same was not exposed or deposited for such purpose or purposes, or was not intended for the food of man, resting with the party charged; and in case any such animal, carcase, &c., appear to him to be diseased, or unsound, or unwholesome, or unfit for the food of man, it shall be lawful for such officer or inspector to seize and carry away the same, in order to have the same dealt with by a justice; and if it shall appear to the justice that any such animal, or any of the said articles, is diseased or unsound, or unwholesome, or unfit for the food of man, he shall order the same to be destroyed, or so disposed of, as to prevent such animal or articles from being exposed for sale or used for such food; and the person, to whom such animal, carcase, &c., belongs or did belong at the time of sale, or exposure for sale, or in whose possession, or on whose premises the same is found, shall, upon conviction, be liable to a penalty not exceeding 20*l.* for every animal, &c. or at the discretion of the justice, without the infliction of a fine, to imprisonment for a term not more than three months.

s. 3. In case any person shall in any manner prevent such medical officer of health or inspector of nuisances from entering any slaughter-house, shop, building, market, or other place where such animal, carcase, &c., is kept for the purpose of sale or of preparation for sale . . . . such person shall be liable to a penalty not exceeding 5*l.*

s. 2 of 26 & 27 Vict. c. 117. The enactment in this section is substituted for s. 26 of the former act (18 & 19 Vict. c. 121), which authorized the inspector to inspect any carcase, &c., exposed for sale, or in the course of, or on its way to slaughtering, dressing, or preparation for sale; and that being found a defective enactment the substituted section gives the power to inspect any "animal, carcase, &c., exposed for sale, or deposited *in any place* for the purpose of sale or preparation for sale" as food for man; and if the carcase be seized and found unfit for the food of man, the person in whose possession, or on whose premises it was found, is subject to penalties or imprisonment. It is said that the wide language of s. 2 must be limited by the language of s. 3, which subjects to a penalty any person who prevents the officer "from entering any slaughter-house, shop, building, market, or other place," where such animal, &c., is. But I think "place," even in s. 3, is not confined to places ejusdem generis with those mentioned, but that it was intended to include every species of premises where animals or carcases, &c., might be kept for sale or preparation for sale as food for man; and, therefore, I think that there is nothing qualifying the generality of the term "place," and that the yard was within the term: and the conviction must be affirmed.

HANNEN and HAYES, JJ., concurred.

Conviction affirmed.

Attorney for appellant: *Jeremiah Briggs.*
Attorneys for respondent: *Dubois & Maynard.*

END OF MICHAELMAS TERM, 1868.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

HILARY TERM, XXXII VICTORIA.

1869
Jan. 12.

HENDERSON *v.* SQUIRE.

Landlord and Tenant—Liability of Tenant for holding over by Sub-Tenant—Measure of Damages.

A tenant, under a parol agreement, without any stipulation that he shall deliver up possession of the premises at the end of the term, is nevertheless bound at law to deliver up complete possession.

Where, therefore, a tenant, under such an agreement, has underlet a part of the premises, and at the determination of both tenancies the under-tenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the whole premises for the time he is kept out of possession, and the costs of ejecting the under-tenant.

First count, trespass for mesne profits.

Second count, that defendant became and was tenant to plaintiff of a messuage, stable, outbuildings, and premises, with the appurtenances, upon the terms (amongst others) that defendant should, at the determination of the tenancy, give up possession to plaintiff, and the tenancy was duly determined, yet defendant did not give up possession to plaintiff, whereby plaintiff lost the use

and profits of the messuage, &c., and incurred expenses in recovering possession of the same.

Pleas: 1. To the first count: Not guilty. 2. To the second count: Payment of 40*s.* into court.

Replication: Damages, ultrà.

Issue thereon.

At the trial before Blackburn, J., at the sittings in Middlesex after Michaelmas Term, 1867, it was admitted by the defendant that he had been tenant to the plaintiff, under a parol agreement, of the premises, 73, Wardour Street, at the yearly rent of 85*l.*; due notice to quit had been given by the plaintiff, and the defendant ought to have given up possession on the 25th of December, 1866. It was proved that the defendant had underlet the ground floor of the house to one Turner, to whom he had given due notice to quit, expiring on the 21st of December, 1866. Turner, however, refused to quit, and held over of his own motion, and against the will of the defendant. On Turner refusing to go out, the plaintiff issued a writ of ejectment against the defendant and Turner, judgment on which was signed against both on the 21st of May, 1867; a writ of possession was executed by the sheriff on the 29th of May. It appeared that the defendant retained possession of the key of the house for four weeks after the 25th of December, 1866, and the sum of 40*s.* was paid into court in respect of this holding over. It was agreed that the value of the premises for the period the plaintiff had been kept out of possession was 40*l.* 10*s.* (beyond the 40*s.* paid into court). The plaintiff sought to recover this sum and the costs of the ejectment, which were 13*l.* 10*s.*

The learned judge directed a verdict for the defendant, with leave to move to enter the verdict for the plaintiff on the second count for 40*l.* 10*s.* or 54*l.*

A rule was obtained accordingly on the ground that the plaintiff was entitled to recover against the defendant one or other of those sums, the defendant not having delivered up possession of the premises at the end of his tenancy, nor until possession was obtained under the ejectment which was rendered necessary to obtain such possession.

Field, Q.C., and *Cave* shewed cause. The question is, whether

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a tenant, under a parol agreement, on the expiration of his tenancy, is bound at all events to give up to his landlord the vacant possession of the premises which have been in his occupation. (1) If the tenant has underlet the premises, and at the expiration of his term has himself quitted the premises, he is not liable for rent because the under-tenant holds over; the latter may be proceeded against as a mere trespasser. The fact of Turner holding over does not make a new contract between the plaintiff and the defendant to pay rent. Turner cannot be the agent of the defendant: he is simply a wrong-doer. There is no authority for saying that a sub-tenant holding over premises against the consent of the tenant makes the tenant liable to the landlord for rent or for the costs of ejecting the sub-tenant. What Lord Kenyon is reported to have said in *Harding* v. *Crethorn* (2), will be relied on for the plaintiff; but there the lease was by deed, and, moreover, it was a mere dictum.

[MELLOR, J. That dictum, however, is cited with approbation by Parke, B., in *Christy* v. *Tancred.* (3)]

That was an action for use and occupation, and it was held that the four original joint-tenants were liable, although only some of them occupied the premises after the tenancy expired, but it was not decided that a tenant was liable where the sub-tenant held over against his consent. In the subsequent case of *Christy* v. *Tancred* (4) Alderson, B., says: "If the holding over by one is with the consent of the other, then the case falls within that of *Harding* v. *Crethorn* (2); but if such an inference was not warranted by the facts of the case, I should be disposed to consider the question before I came to that conclusion." Here it is distinctly found that the sub-tenant held over against the consent of the tenant. *Draper* v. *Crofts* (5) decided that one tenant cannot bind his co-tenant merely by holding over.

(1) *Hawkins, Q.C.*, for the plaintiff, pointed out that the defendant, having paid money into court, had admitted the contract declared on in the second count; but the Court intimated that they would hear the argument for the defendant, and would make such amendment in the pleadings as would leave it open to the defendant to deny the contract. As the Court decided against the defendant without calling on the plaintiff, it became unnecessary to make any actual amendment in the pleadings.

(2) 1 Esp. 57.

(3) 7 M. & W. 127, 130.

(4) 9 M. & W. 438, 448.

(5) 15 M. & W. 166.

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[COCKBURN, C.J. There is a distinction between the case of joint-tenant and under-tenant. In the case of joint-tenants, they are both let into possession with the consent of the lessor, but in the case of an under-lessee the wrong is done by a man whom the tenant has put into possession.]

Hawkins, Q.C., and *Raymond*, in support of the rule, were not called upon.

COCKBURN, C.J. I am prepared to abide by the law as laid down by Lord Kenyon in *Harding* v. *Crethorn* (1), that "when a lease is expired the tenant's responsibility is not at an end; for if the premises are in possession of an under-tenant, the landlord may refuse to accept the possession, and hold the original lessee liable; for the lessor is entitled to receive the absolute possession at the end of the term." That has been considered law ever since, and has been recognized as law in all the text books. In the case of *Christy* v. *Tancred* (2), though the facts are not exactly the same, for that was a case of a co-tenant holding over, Parke, B., adopts the ruling of Lord Kenyon. We should be doing great mischief if we were to lay down a contrary rule. This case is plainly distinguishable from that of a joint-tenant holding over. In the case of joint-tenants the lessor himself creates the joint tenancy; but the case of a sub-tenant is different—he has been let into possession not by the lessor but by the tenant. The landlord is entitled to recover all the loss he has sustained by not being put in possession of the entire premises at the end of the term; he is entitled to a sum equivalent to the rent which he has lost, and to the expenses he has been put to in taking legal proceedings to oust the sub-tenant from a wrongful possession. The plaintiff is therefore entitled to recover in respect of both items of his claim, viz. 54*l.*

BLACKBURN, J. I am of the same opinion. The question is, where there is a tenancy, and nothing is expressed as to delivering up possession at its determination, whether there is an implied contract that the tenant shall not only go out of possession, but restore the possession to the landlord. Here the tenant had sublet

(1) 1 Esp. 57.

(2) 7 M. & W. 127, 130.

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the premises to a man who, under some fancied claim of right, held over without the consent and against the will of the tenant, his landlord. I think that there is such an implied contract; for as the landlord who is to put the tenant into possession could not fulfil his contract unless he put him into absolute possession, the obligation on the part of the tenant at the end of the term is correlative. Lord Kenyon in *Harding* v. *Crethorn* (1) expressly rules that "the lessor is entitled to receive the absolute possession at the end of the term," and he further lays down the artificial rule, that the lessee would be liable for rent not on an actual but constructive occupation by the under-tenant holding over. After this ruling of Lord Kenyon, in 1793, the case of *Christy* v. *Tancred* (2) came twice before the Court of Exchequer: in the first case Parke, B., seems to have applied the rule laid down by Lord Kenyon to joint-tenants as well as sub-tenants; in the second case (3) the doubt was, not whether Lord Kenyon was wrong in the rule he had laid down, but whether, where premises are let to co-tenants, and one holds over without the assent of the other, both are liable in an action for use and occupation. It is true that there is very little authority on the question under discussion; but, independently of authority, on principle, seeing that the landlord gives the tenant absolute possession, it is the duty of the tenant to restore absolute possession.

Then comes the next question, what measure of damages the plaintiff is entitled to recover. He is entitled to what the rent would have amounted to for the time he was kept out of possession, and also to the sum of 13*l.* 10*s.*, the costs of the action of ejectment; for we must take it that was the best mode of recovering possession: and these costs follow as a necessary consequence of letting to an under-tenant if he refuses to go out of possession: *Collen* v. *Wright* (4) proceeded precisely on this principle.

MELLOR, J. The cases bearing on the point have been brought before us, but in none of them has any doubt been thrown on the ruling of Lord Kenyon. All notices to quit require the tenant to

(1) 1 Esp. 57.
(2) 7 M. & W. 127, 130.
(3) 9 M. & W. 438.
(4) 7 E. & B. 301; 26 L. J. (Q. B.) 147.

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quit and deliver up possession, therefore all practice and experience are consistent with law and common sense. There has been a breach of contract, and the damages sought to be recovered are those which necessarily flow from the breach. The proper and legitimate course to recover possession of premises is to bring an action of ejectment.

HAYES, J. I am of the same opinion. It is obvious that if the landlord had not brought an action of ejectment, but had allowed the sub-tenant to remain in possession, and the rent to run on against the defendant, his answer to an action for use and occupation would have been, Why did not you bring ejectment?

Rule absolute to enter the verdict for 54*l.*

Attorneys for plaintiff: *Senior, Attree, & Johnson.*
Attorney for defendant: *Roe.*

GRAY *v.* WEST AND WIFE.

Jan. 28.

Costs—30 *&* 31 *Vict. c.* 142, *s.* 5—*Damages not exceeding* 10*l. in an Action for Slander.*

By 30 & 31 Vict. c. 142, s. 33, sch. (C), all the sections of previous county court acts as to costs are repealed; and by s. 5, if in an action commenced after the passing of the act in any of the superior courts, the plaintiff shall recover a sum not exceeding 10*l.* in an action of tort, he shall not be entitled to any costs, unless the judge certify that there was sufficient reason for bringing the action in the superior court, or the court or a judge at chambers shall by rule or order allow such costs.

In an action for slander commenced in a superior court after the passing of the act, a verdict was found for the plaintiff for 10*l.*, and the judge refused to certify. On an application to the court for costs:—

Held, assuming s. 5 to apply to cases in which the county court had no jurisdiction, that, as the plaintiff had recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for slander, and as he could not have sued in the county court, he ought to be allowed his costs.

ACTION for slanderous words uttered by the female defendant.

Plea: Not guilty.

The action was commenced on the 13th of October, 1867, after the passing of 30 & 31 Vict. c. 142. At the trial, before Hannen, J.,

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at the sittings in Middlesex after last Trinity Term, a verdict was found for the plaintiff for 10*l*. The learned judge declined to certify under 30 & 31 Vict. c. 142, s. 5 (1), that there was sufficient reason for bringing the action in the superior court; the matter was then brought before a judge at chambers, who referred the plaintiff to the court.

A rule was accordingly obtained, calling upon the defendants to shew cause why the plaintiff should not be allowed her costs to be taxed by one of the masters.

Nov. 16. *Francis* shewed cause. The object of s. 5 was to prevent the bringing of frivolous actions in the superior courts, even although they were for slander; the plaintiff, therefore, is wholly deprived of costs. Section 34 of 23 & 24 Vict. c. 126, is repealed; under that enactment, if the plaintiff in an action of slander did not recover more than 5*l*., the judge could deprive him of costs; and the present enactment is substituted as a more efficacious provision for carrying out the intention of the legislature.

Anderson, in support of the rule. The plaintiff could not have sued in the county court, she could only bring her action in the superior court; and as the damages assessed by the jury were substantial, she ought not to be deprived of her costs. The true construction is, that s. 5 applies only to those actions which can be brought in the county court.

Cur. adv. vult.

Jan. 28. The judgment of the Court (Cockburn, C.J., Hannen, and Hayes, JJ.), was delivered by

HAYES, J. This was a case relating to the effect of the late County Court Act, 30 & 31 Vict. c. 142, upon the costs of actions brought in the superior court; and as this action was commenced

(1) 30 & 31 Vict. c. 142, s. 5:—"If in any action commenced after the passing of this act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding 20*l*. if the action is founded on contract, or 10*l*. if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs."

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after the passing of that act, and was tried after it had come into operation, the question stood clear of the provisions of the previous statutes, and depended entirely upon the construction of s. 5 of the late act.

The action was for slander, and was commenced in October, 1867, and tried at the sittings for Middlesex after last Trinity Term, before Hannen, J., when the plaintiff obtained a verdict for 10*l*. The learned judge declined to certify, and, the plaintiff having applied for costs to a judge at chambers, who referred the question to the court, a rule for the allowance of the plaintiff's costs was obtained and argued in last term.

The prominent point discussed in the case was that the plaintiff had no power of suing the defendants for this cause of action in the county court, s. 58 of 9 & 10 Vict. c. 95, which excludes the county court from original jurisdiction in slander, being still in force; and although, by s. 10 of the late act, a defendant is enabled to apply under certain circumstances to have such an action remitted for trial to the county court, no such application was made, and consequently the plaintiff was obliged to proceed to trial in the superior court or abandon the action altogether.

Under the elaborate enactments of the previous county court acts, the liability of plaintiffs to the loss of costs for proceeding in the superior courts was carefully confined to cases in which the county courts had jurisdiction (see 9 & 10 Vict. c. 95, s. 129; 13 & 14 Vict. c. 61, ss. 11, 12, 13; and 15 & 16 Vict. c. 54, s. 4). Indeed, the very object and intention of such provisions hitherto has uniformly been to further the jurisdiction of the inferior court by practically compelling plaintiffs to sue there for causes of action within its jurisdiction; and it is obviously quite beside the general object of a county court act to subject plaintiffs to the loss of costs for suing in the superior courts for causes of action which could not be sued for elsewhere.

What now gives rise to the question in this case is, that all the former enactments above-mentioned, which expressly preserved the plaintiffs' right to costs in cases in which the county court had no jurisdiction, were repealed by the late act, s. 33, sch. C.; and in lieu of the repealed enactments, the right to costs is now governed by the brief provision contained in s. 5 of the late act,

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which is as follows:—"If in any action commenced after the passing of this act in any of her Majesty's superior courts of record the plaintiff shall recover a sum not exceeding 20*l.* if the action is founded on contract, or 10*l.* if founded on tort, whether by verdict, judgment by default, or on demurrer or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court or a judge at chambers shall by rule or order allow such costs."

The general and comprehensive words of the earlier part of this section would certainly appear capable of embracing a case like the present; and it was contended on behalf of the defendants that they did so, and that, as the learned judge at the trial had declined to certify under s. 5, the Court would not now review his decision. But it is to be observed, that the jurisdiction given to the judge at the trial, and that given to the Court, or a judge at chambers, is separate and distinct. The judge at the trial is empowered to certify on a single point, namely, whether there was sufficient reason for bringing the action in the superior court. The power given to the Court, or a judge at chambers, is generally to allow the plaintiff his costs. The words relating to the certificate of the judge at the trial are taken from those of the enactment previously in force on this point, which was contained in s. 12 of 13 & 14 Vict. c. 61, and it is clear that they were there intended to apply to those cases only in which the county court had jurisdiction, but in which nevertheless it was reasonable that the plaintiff should sue in the superior court. This is in effect the natural import of such a form of certificate, which is appropriate to express an option and reasonable election of the plaintiff to sue in the superior court, as contrasted with the county court, but appears quite inappropriate to refer to a case in which the plaintiff had no option, but was compelled to sue in the superior court or not to sue at all. It appears to us that the certificate was intended to have the same meaning and application in the section now before us as a similar certificate had under 13 & 14 Vict. c. 61, s. 12, and if this be so it seems to give rise to much doubt whether s. 5 of the late act was really intended to have any application to cases in which the county court had no jurisdiction.

If, however, it was intended to apply to such cases, the general authority given to the court or a judge to allow the plaintiff his costs, would at all events enable them to do so in cases of this nature where it appeared proper to make such allowance. In making such allowance we should not be reviewing or interfering with the discretion exercised by the judge at the trial, who merely declined to give in this case a certificate which was not properly applicable to it, but was only applicable to cases in which the county court had jurisdiction. And, as it is plain that the legislature intended that plaintiffs, who had the power of suing in the county court but elected on reasonable grounds to sue in the superior court, were to be allowed their costs, it seems impossible to suppose that it was intended that such allowance should not be made to plaintiffs who had no such election, and whose only remedy was in the superior court.

We think, therefore, that as in the present case the plaintiff has recovered an amount much beyond what would have entitled her to costs under the general law applicable to actions for slander in the superior court, and as she could not have sued elsewhere, we think that she ought to be allowed her costs in this action; and therefore, that the rule should be made absolute.

Rule absolute.

Attorney for plaintiff: *Carpenter.*
Attorneys for defendants: *Lloyd & Lane.*

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Jan. 20.

BAILY *v.* DE CRESPIGNY.

Covenant—Meaning of "Assigns" in a covenant—Covenant not to build—Assignment by compulsion of Law.

Declaration: that the defendant, in 1840, demised by deed certain premises to the plaintiff for a long term of years, and the defendant covenanted that "neither he nor his assigns would, during the term, permit any messuage, &c., to be built on a paddock fronting the demised premises;" alleging as breaches, 1, that the defendant during the term permitted a railway station to be built on the paddock; 2, that the defendant assigned the paddock to a railway company, who erected the railway station on the paddock. Plea: that after the making of the lease the railway company required to take the paddock under powers given them by an Act of Parliament of 1862, for purposes for which they were by the Act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the Act; and that the company under the powers so conferred did compulsorily purchase and take the paddock, and that the assignment by the defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the Act.

Replication: that though the erections were reasonable, it was not necessary or compulsory for the company to build them.

On demurrers to the plea and replication:—

Held, that the defendant was entitled to judgment: for the defendant was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim, "lex non cogit ad impossibilia;" and that it could make no difference whether the company were only empowered or were compelled to build the station on the paddock.

DECLARATION: That defendant by deed demised, among other hereditaments, to the plaintiff a certain piece or parcel of ground situate in the parish of St. Giles, Camberwell, in the county of Surrey, and all that messuage or tenement, together with other erections and buildings then recently erected and built thereon by plaintiff, for 89 years from the 25th of March, 1840, at a rent thereby reserved; and defendant thereby, among other things, covenanted with the plaintiff that neither he, the defendant, nor his heirs, nor his assigns, should or would, during the term, permit to be built, on the paddock fronting the premises demised by the deed towards the north, any messuage or dwelling-house, coach-house, or stable, or other erection, save and

except summer or pleasure houses in private garden ground, and also a church or chapel at the eastern extremity of the paddock. Averment of the performance of all conditions precedent, &c. Breach: that during the term the defendant permitted to be built on the paddock certain erections other than those by the deed excepted, to wit, a railway station with the appurtenances thereof, including waterclosets and urinals. That by reason of the premises, the plaintiff has been greatly annoyed and damnified in the enjoyment of the land, messuage, and hereditaments demised by the deed as aforesaid, and the value of the land and messuage and of the term has been much depreciated, and the amenity and comfort of the land and messuage as a residence have been deteriorated by the interference with the prospect therefrom, by reason of the erections, and by reason of the smoke proceeding from the chimneys of the railway station and premises, and by reason of the plaintiff's messuage being overlooked by the windows of the railway station and premises; and otherwise, by reason of the premises, the plaintiff has been prevented from having as beneficial a use and occupation of the lands as he otherwise would have had, and has been otherwise damnified.

Second breach: That, after the making of the deed and demise, and during the term thereby granted, the defendant assigned the paddock to the London, Brighton, and South Coast Railway Company, and that the company, after the assignment and during the term, and while they were possessed of the paddock, by virtue of the assignment from the defendant, erected and built the railway station, with the appurtenances on the paddock, contrary to the covenant, to the damage of the plaintiff as above mentioned.

Plea: That, before the committing of the alleged breaches, and after the making of the deed, the London, Brighton, and South Coast Railway Company required to take and purchase the paddock under the powers given them by "The London, Brighton, and South Coast Railway (New Lines) Act, 1862," and for the purposes for which they were by the act empowered to purchase and take the paddock. And that the paddock was land which the company were empowered by the act to purchase and take compulsorily for the purposes of their undertaking, authorized by the act. And that, after the making of the deed, and before the

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committing of the alleged breaches, the company did, under and according to the power conferred upon them by the act, and by virtue of the act, compulsorily purchase and take the paddock, and for the completion of the purchase the defendant did, by deed, convey the paddock to the company and their successors, which is the assignment in the declaration mentioned; whereupon and whereby the company, under and by virtue of the act, became seised in fee of the paddock, and the company, being so seised, built on the ground or paddock the erections in the declaration mentioned, which were erections reasonably required by them for the purposes of their undertaking authorized by the act, which building by the company is the building complained of in the breaches. And that, except as aforesaid, the defendant did not permit the erections to be built.

Replication: That, although reasonable, still it was neither necessary or compulsory for the railway company to build the station on the land in question.

Demurrers to the plea and replication, and joinder.

Nov. 10. *F. M. White*, for the plaintiff. The defendant is not discharged from his liability under the covenant by the act of parliament obtained by the railway company. The defendant has land with the burden of a covenant on it, and he deals with it as if there was no covenant, and gets a larger compensation for it. He is liable to the plaintiff for the difference between the value of the land sold without the covenant and the value of it if sold with the covenant. If the railway company had been compelled by their act to build the station in the paddock, then no action would lie: *Wynn* v. *Shropshire Union Railway and Canal Company* (1): but here the railway company might have built the station in another spot, and the defendant ought to have stipulated that they should not build it on the paddock.

Raymond, for the defendant. When a covenantor covenants for himself and assigns, he means his voluntary assigns, and he never intended to covenant for the acts of any assignee that the legislature might thrust upon him. Where an assignment is compulsory upon a covenantor, it is not within his contract, and assignees who

(1) 5 Ex. 420.

come in under a statute can in no way be said to be his assigns. Here it is in vain for the defendant to say he will not sell his land; he is compelled to sell, though there are three modes by which compensation may be assessed to him—by agreement, by arbitration, or by a jury. If the defendant had not executed the conveyance of the land to the company, the money would have been paid into court, and the company would, nevertheless, have taken the land. In *Doe* v. *Carter* (1) and *Doe* v. *Bevan* (2) a clear distinction is drawn between assigns by act of parties and assigns by operation of law: this is essentially an assignment by compulsion of law. In *Slipper* v. *Tottenham and Hampstead Junction Railway* (3), the Master of the Rolls says:—"As soon as the land is required for the purpose of the railway, and notice is given to take it under the act, the licence to assign is no longer required, being virtually taken away by the clause of the act of parliament, as is laid down in an analogous case in *Wadham* v. *Marlowe.* (4) The lessor can neither refuse the licence to assign nor assent to the assignment, for he has nothing more to do with it." So here the defendant ought not to be made liable for what he cannot in any way help.

White, in reply.

Cur. adv. vult.

Jan. 20. The judgment of the Court (Cockburn, C.J., Lush, Hannen, and Hayes, JJ.) was delivered by

HANNEN, J. This was an action on a covenant contained in a lease of certain premises granted by the defendant to the plaintiff in 1840, for a term of 89 years, whereby the defendant covenanted that "neither he nor his assigns should or would, during the term, permit to be built any messuage, &c., on a paddock fronting the demised premises." The breaches alleged are:—1. That the defendant during the term permitted a railway station to be built on the paddock. 2. That the defendant assigned the paddock to the London and Brighton Railway Company, who erected the railway station on the paddock.

To this declaration the defendant pleaded that, after the making of the deed, the railway company required to take the paddock

(1) 8 T. R. 57.
(2) 3 M. & S. 353.
(3) Law Rep. 4 Eq. 112, 114.
(4) 8 East, 314, n.

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under powers given them by Act of Parliament, 1862, for purposes for which they were by the act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the act; and that the company, under the powers so conferred, did compulsorily purchase and take the paddock; and that the assignment by defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorised by the act, and that, except as aforesaid, the defendant did not permit the said erections to be built. The plaintiff demurred to this plea; and also replied that the erections, though reasonable, were not necessary or compulsory for the company to build. To this replication there was a demurrer.

It must be taken on these pleadings that the assignment by the defendant to the railway company was altogether made under the requirements of the act of parliament, and without any stipulation introduced into the conveyance by the vendor or the purchaser, which would alter its character as an act done by the defendant in obedience to the command of the legislature. The 75th section of the Lands Clauses Consolidation Act, 1845, is imperative that the owner of lands shall, on the performance of the conditions imposed on the company, when required so to do, duly convey the lands to the promoters, or as they shall direct, and in default thereof it shall be lawful for the promoters to execute a deed poll, declaring the fact of such default having been made, and thereupon all the estate and interest in such lands, capable of being sold and conveyed by such owner, shall vest absolutely in the promoters of the undertaking.

We think that no distinction can be drawn between the case of an owner of lands who does that which it is his duty to do, namely, conveys to the company, and one who by refusing to convey obliges the company to obtain a title to the lands by the execution of a deed poll. In the one case, as in the other, the transfer of the title is compelled by the legislature, and it cannot be supposed that it was intended that the landowner who acts solely in obedience to the law should be in a worse position than one who refuses com-

pliance. In either case the railway company must be regarded as the assignee of the land, not by the voluntary act of the former owner, but by compulsion of law.

The substantial question, therefore, raised on this record is whether the defendant is discharged from his covenant by the subsequent act of parliament, which put it out of his power to perform it.

We are of opinion that he is so discharged on the principle expressed in the maxim "lex non cogit ad impossibilia."

We have first to consider what is the meaning of the covenant which the parties have entered into. There can be no doubt that a man may by an absolute contract bind himself to perform things which subsequently become impossible, or to pay damages for the non-performance, and this construction is to be put upon an unqualified undertaking, where the event which causes the impossibility was or might have been anticipated and guarded against in the contract, or where the impossibility arises from the act or default of the promissor.

But where the event is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, they will not be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happens. It is on this principle that the act of God is in some cases said to excuse the breach of a contract. This is in fact an inaccurate expression, because, where it is an answer to a complaint of an alleged breach of contract that the thing done or left undone was so by the act of God, what is meant is that it was not within the contract; for, as is observed by Maule, J., in *Canham* v. *Barry* (1), a man might by apt words bind himself that it shall rain to-morrow or that he will pay damages. This is the explanation of the case put by Lord Coke in *Shelley's Case* (2): "If a lessee covenants to leave a wood in as good a plight as the wood was at the time of the lease, and afterwards the trees are blown down by tempest, he is discharged of his covenant," because it was thought that the covenant was intended to relate

(1) 15 C. B. at p. 619; 24 L. J. (C.P.) at p. 106.
(2) 1 Rep. at p. 98, a.

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only to the tenant's own acts, and not to an event beyond his control, producing effects not in his power to remedy. (See Shep. Touch. 173.) It is on this principle that it has been held that an impossibility, arising from an act of the legislature subsequent to the contract, discharges the contractor from liability. Again, to quote an observation of Maule, J., in *Mayor of Berwick* v. *Oswald* (1), there is nothing "to prevent parties, if they choose by apt words to express an intention so to do, from binding themselves by a contract as to any future state of the law . . . . but people in general must always be considered as contracting with reference to the law as existing at the time of the contract . . . . And the words shewing a contrary intention ought to be pretty clear to rebut that presumption." To hold a man liable by words, in a sense affixed to them by legislation subsequent to the contract, is to impose on him a contract he never made. This is the principle of that which was laid down in *Brewster* v. *Kitchell* (2), that "where H. covenants not to do an act or thing which was lawful to do, and an act of parliament comes after and compels him to do it, the statute repeals the covenant. So if H. covenants to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is repealed."

To apply the foregoing observations to the present case: The defendant has covenanted that his "assigns" shall not build. The word "assigns" is a term of well-known signification, comprehending all those who take either immediately or remotely from or under the assignor, whether by conveyance, devise, descent, or act of law: *Spencer's Case.* (3) The defendant when he contracted used the general word "assigns," knowing that it had a definite meaning, and he was able to foresee and guard against the liabilities which might arise from his contract so interpreted. The legislature by compelling him to part with his land to a railway company, whom he could not bind by any stipulation, as he could an assignee chosen by himself, has created a new kind of assign, such as was not in the contemplation of the parties when the contract was entered into. To hold the defendant responsible for the acts of such an assignee is to make an entirely new contract for

(1) 3 E. & B. at p. 665; 23 L. J. (Q.B.) at p. 324.
(2) 1 Salk. 198.
(3) 5 Rep. 16.

the parties. On the other hand, to confine the word "assigns" to those who take by the voluntary act of the assignor would not, as was suggested in argument, limit the operation of the covenant to his immediate grantee: because all those who take from the first assignee do so in consequence of the original voluntary act of the assignor, and it was his own fault that he assigned at all, or that he did not in the original conveyance guard against the acts of subsequent assignees. To exempt him from liability for such acts would be contrary to the intention of the parties, to be collected from their words, interpreted according to their known ordinary signification.

It was, indeed, conceded on the argument by the plaintiff's counsel, that the defendant would not be liable for all acts of the railway company, as he would have been for the acts of any other assignee; but it was contended that the defendant was relieved from liability on his covenant as to those acts only which the company was required by the act of parliament to do, and not as to those which the company was merely empowered to do.

We do not think that this distinction is well founded. The rule laid down in *Brewster* v. *Kitchell* (1) rests upon this ground, that it is not reasonable to suppose that the legislature, while altering the condition of things with reference to which the covenantor contracted, intended that he should remain liable on a covenant which the legislature itself prevented his fulfilling; but the covenantor in this case is equally disabled from preventing the railway company from doing those things which it is *empowered* to do, as those which it is *required* to do; why then should there be a difference in the liability of the covenantor with respect to the one and the other?

But, assuming that the imposing on the defendant by the legislature of assigns whom he could not control, would, without more, free him from the engagements which he entered into with reference to assigns whom he could control, it remains necessary to deal with the argument that, though the company was empowered to take the lands free from the restrictions upon building, this was only on condition of paying full compensation for what they got, and that it must be supposed that the defendant obtained from the company not only the value of the land as he held it, encumbered

(1) 1 Salk. 198.

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with a covenant not to build, but also what was deemed a fair consideration for the right to build.

It appears to be assumed in this argument that the difference, between the price of the land encumbered with the covenant not to build and the price of it freed from that covenant, would be the amount of damages to be paid by the defendant to the plaintiff in the present action. But that is not so: the plaintiff, if entitled to recover at all in this action, would be entitled to the damage he had sustained by the breach of the covenant, even if these damages should exceed the whole value of the land taken. No doubt, if the legislature had in express terms, or by necessary implication from its language, given to persons in the defendant's situation a remedy over against the railway company in respect of acts done by the company, this would have indicated that the legislature did not intend that the defendant should be freed from liability on his covenant, although he was disabled from performing it. But we cannot find in the railway acts any express or implied enactment to this effect. It has been already pointed out that there is no relation between the compensation which the defendant would be entitled to for his land and the damages for which he would be liable to the plaintiff. How could it be possible for the defendant to lay before the compensation jury evidence of the extent of his liability on such a covenant as that under consideration? How could he, in an inquiry to which the plaintiff was no party, offer evidence of the injury which the plaintiff might by any possibility sustain in the uncertain event of the company erecting a station or other building on the land taken?

Further, if the covenant of the defendant is to be considered as broken by the act of the railway company so as to entitle the plaintiff to damages, it must be deemed to carry with it the other consequences of a breach of contract. Thus, if the situation of the plaintiff and the defendant in this case had been reversed, and the covenant not to build on land adjoining the demised premises had been entered into by a lessee, with the usual proviso for re-entry in the event of breach of any covenant, the lessee would have been liable to forfeiture of his whole interest by reason of an act over which he had no control; and the railway company would be liable, if the plaintiff's contention be correct, to pay, by way of

compensation for a piece of land taken, the whole value of the interest of the lessee in the adjoining estate.

The solution of the case appears to be, that the plaintiff is one of a numerous class of persons injured by the construction of a railway, for whom the legislature has not provided compensation. This may be illustrated by reference to the special damage claimed in the declaration. It is there alleged that the amenity and comfort of the land demised have been diminished by reason of the prospect therefrom being interfered with, and by being overlooked by the windows of the station, with the appurtenances, including water-closets and urinals. These are heads of damage for which railway companies are not in ordinary circumstances bound to give compensation, but for which the defendant would be liable in an action on his covenant.

We do not think that it was the intention of the legislature to make a railway company liable for such damages in the exceptional case of a person, in the position of the plaintiff, having taken a covenant from his lessor on the terms of that under consideration, or that, if such had been the intention of the legislature, so peculiar a head of compensation as that now suggested, namely, for liability to damages for breach of collateral covenants resulting from the taking of lands, would have been left to be conjectured from the vague language of the Lands Clauses Consolidation Act.

For these reasons we are of opinion that our judgment ought to be for the defendant.

Judgment for the defendant.

Attorney for plaintiff: *S. A. Beck.*
Attorneys for defendant: *Domville, Lawrence, & Graham.*

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Nov. 9.

THE QUEEN *v.* VAUGHAN AND THE METROPOLITAN DISTRICT RAILWAY COMPANY.

Railway Company—Compensation—Loss of Trade Profits—Lands Clauses Consolidation Act (8 *Vict. c.* 18), *s.* 121.

In June, 1865, a railway company served on F., a tenant from year to year, the usual notice to treat, and a notice as required by their Act, of their intention at the expiration of six months to enter and take the premises. F. sent in his particulars of claim to the company, but they did nothing further till 1868. F. in the meantime continued to carry on his business of a publican on the premises. In March, 1868, a summons was served by the company on F., and in April, the question of the compensation to be paid by the company to F. for his interest in the premises, was heard before a metropolitan police magistrate, under s. 121 of the Lands Clauses Consolidation Act. F., inter alia, claimed compensation for the depreciation in the value of such interest, which had taken place in the interval since the expiration of the six months by reason of the execution of the company's works, the custom of the public-house having been greatly reduced by the pulling down of the neighbouring houses taken under the company's statutory powers. The magistrate having refused to assess this item of compensation; on a rule to compel him to do so:—

Held, that this depreciation was not the subject of compensation, and the claim had been rightly rejected.

By the Metropolitan District Railways Act, 1864 (27 & 28 Vict. c. cccxxii.), the Metropolitan District Railway Company were empowered to take a skittle ground, shed, and yard, belonging to a public house called the Black Bull, Little Chapel Street, Westminster, of which Edmund Furber was the occupier, as a tenant from year to year, at a rent of 100*l.*

The company's act incorporated the principal sections of the Railways Clauses Consolidation Act, 1845, of the Lands Clauses Consolidation Act, 1845, and of the other general Acts.

On the 16th of June, 1865, the company served Furber with the usual notice to treat for the skittle ground, shed, and yard; and they also served a notice on him (as the person assessed to the poor-rate), with a notice pursuant to s. 59 of 27 & 28 Vict. c. cccxxii. (1) of their intention to enter and take the same on or after the expiration of six months from that date.

(1) By 27 & 28 Vict. c. cccxxii., s. 59, the company shall not enter on or take any tenement under the powers of this Act, until the expiration of six months

* The report of this case has been unavoidably delayed.

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On the 7th of July, 1865, Furber sent particulars of claim to the company, stating his interest in the public house to be that of tenant from year to year, and claiming "for the good-will of the business carried on upon the premises 750*l*. The furniture, fixtures, and utensils in trade to be taken by valuation in the usual way, and the loss by forced sale of stock in trade (if any) when possession is required. Valuers and surveyors' fees to be paid in addition."

The premises not being immediately required by the company, no further proceedings were taken until October, 1867, when the company endeavoured to arrange terms with Furber, but failed.

On the 16th of March, 1868, the company's contractor entered on the skittle ground, and began to pull down the shed without any notice to or consent of Furber, and he accordingly commenced an action and obtained an injunction on the 18th of March. On the 28th of March the company served a summons on Furber to appear before a police magistrate for the purpose of the magistrate hearing and determining Furber's claim to compensation, under 8 Vict. c. 18, s. 121 (1), which by s. 84 of the company's Act was expressly applied to lands taken under their Act. On the same day the company served a notice on Furber that they required possession of the skittle ground, shed, and yard.

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after serving notice in writing of their intention to take the same on the person assessed to the poor-rate of such tenement by serving such notice at such tenement.

(1) 8 Vict. c. 18, s. 121 :—"If any such lands shall be in the possession of any person having no greater interest therein than as tenant for a year, or from year to year, and if such person be required to give up possession of any lands so occupied by him before the expiration of his term or interest therein, he shall be entitled to compensation for the value of his unexpired term or interest in such lands, and for any just allowance which ought to be made to him by an incoming tenant, and for any loss or injury he may sustain, or if a part only of such lands be required, compensation for the damage done to him in his tenancy by severing the lands held by him, or otherwise injuriously affecting the same; and the amount of such compensation shall be determined by two justices, in case the parties differ about the same; and upon payment or tender of the amount of such compensation, all such persons shall respectively deliver up to the promoters of the undertaking, or to the person appointed by them to take possession thereof, any such lands in their possession required for the purposes of the special Act."

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On the 2nd of April Furber gave notice to the company to take the whole of his premises, and at the hearing, on the 20th of April, it was agreed that the summons should be amended so as to include the whole.

The summons was adjourned, and Furber attended at the hearing of the adjourned summons on the 20th of April, and deposed that "the net profit of his business as a publican for some time previously and up to the month of June, 1865, amounted to 490*l.* per annum; and that in consequence of the execution of the works of the company in destroying the neighbourhood near to and surrounding the house, by the demolition and destruction of the adjoining houses and otherwise, his net profits in the years 1866, 1867, and the year 1868 up to the said 20th of April, had diminished to a net profit of not more than 200*l.* per annum."

Some discussion ensued before the magistrate as to the extent of the right of Furber to compensation; and the hearing being again adjourned, the parties again attended before the magistrate, when the following was submitted to him in writing on behalf of Furber: "That the compensation to be paid for the value of his interest in the premises, such as it was and would have remained but for the works of the company, ought to be assessed under the following heads:—1. For the value of his interest in the premises at the present time, such as incoming tenant would give him, 350*l.* 2. For the depreciation in value of such interest caused by the company's works having reduced the custom of the house from a profit of 495*l.* a year to 200*l.* a year, 385*l.* 3. For the loss of trade profit up to the present time from the commencement of the works, about two and a half years, 700*l.* 4. Value of fixtures and trade utensils and furniture to be paid for by an incoming tenant. 5. Value of stock to be paid for by an incoming tenant. 6. Costs. These last three items to be disposed of as agreed on."

On behalf of the company it was contended that the magistrate ought not to allow the loss for trade profits.

The magistrate on the 29th of April gave a judgment in writing, by which he determined that "the compensation to which Furber is entitled, in respect of compensation for the value of the unexpired term and interest in the said Black Bull public-house, yard, shed, and skittle ground, and for allowance, which ought justly to

be made to him by an incoming tenant for goodwill and trade fittings and fixtures, and for the licences of the said public-house, and for the loss in respect of the depreciated value of furniture therein, amounted on the whole to the sum of 837*l.* 18*s.*," and he ordered that sum, together with 161*l.* 4*s.* 10*d.* for costs, to be paid by the company. The trade fixtures and fittings were valued at 173*l.* 10*s.*, which sum was included in the above sum of 837*l.* 18*s.*

The injunction was dissolved on payment of the said sum of 837*l.* 18*s.* and 161*l.* 4*s.* 10*d.*, without prejudice to any further claim.

Whereupon a rule was obtained calling on James Vaughan, Esq., the magistrate, and the company, to shew cause why the magistrate should not assess the amount of compensation to be paid by the company to Furber "in respect of the damage done to his interest in the premises by reason of the execution of the works of the company, and resulting in a loss of trade profits up to the 29th of April, 1868, from the commencement of the works, amounting to the sum of 700*l.*"

Hawkins, Q.C., shewed cause. The item of claim disallowed is clearly inadmissible. The case is governed by *Ricket* v. *Metropolitan Railway Company* (1), and indeed is a stronger case, as there is here no road blocked up, and no interruption of the thoroughfare to the claimant's house, but simply what he calls a destruction of the neighbourhood, by the pulling down of houses; this the company might lawfully have done without statutory powers, and no action could have been brought against them; and therefore the damage is not the subject of compensation: *New River Company* v. *Johnson* (2), *Rex* v. *London Dock Company.* (3) The case does not come within the distinction taken by Crompton, J., in the case of *Stockport, Timperley, and Altringham Railway Company.* (4)

J. J. Aston, in support of the rule. If there was any doubt as to the legality of the claim, the magistrate ought to have assessed the compensation, leaving the legality to be afterwards contested in an action. The company were bound to take the land after the six months had elapsed: *Morgan* v. *Metropolitan Railway Com-*

(1) Law Rep. 2 H. L. 175.
(2) 2 E. & E. 435; 29 L. J. (M.C.) 93.
(3) 5 A. & E. 163.
(4) 33 L. J. (Q.B.) 251, 253.

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pany (1); and they are therefore liable for the consequence of their laches.

[COCKBURN, C.J. I do not see how that case makes in favour of the claimant.]

In *Ricket* v. *Metropolitan Railway Company* (2), (from the decision in which Lord Westbury dissented), no land of the claimant was taken; and that is the very distinction taken by Crompton, J., in the case of *Stockport, Timperley, and Altringham Railway Company* (3), that where land is taken the owner is entitled to compensation in respect of any injury caused by the works. The terms of s. 121 of 8 Vict. c. 18, are that the tenant from year to year shall be entitled to compensation for "any loss or injury." *Reg.* v. *Stone* (4), shews that a notice to treat is not equivalent to requiring possession; here the claimant was not required to give up possession till March, 1868, and he therefore had full right to carry on his business in the meantime.

[LUSH, J. In addition to the notice to treat, there was the notice under the special Act, that the company would require the premises at the end of six months.]

COCKBURN, C.J. I am clearly of opinion that this rule must be discharged. The tenant was entitled, on the property being taken by the company, to compensation, but entitled only to compensation assessed according to the profit he was then making by carrying on his business on the premises; but as soon as the company acquired the right of possession in the property the tenant's interest ceased; and if they had taken possession, his business and profit must have ceased also. It is quite clear the tenant cannot ask for compensation because the neighbouring property has been taken. The company might have done this by voluntary agreement quite independently of any statutable powers, and so destroyed the custom of the public-house, and no action could have been maintained by him for the loss, inasmuch as no injury or trespass was done to him; consequently he could not have claimed compensation for this description of loss. This is an item of compensation not contemplated by the statute.

(1) Law Rep. 3 C. P. 553.
(2) Law Rep. 2 H. L. 175.
(3) 33 L. J. (Q.B.) 251, 253.
(4) Law Rep. 1 Q. B. 529.

The only ground on which the claim could be made with any show of reason is, that the company, instead of taking the premises when they ought to have taken them, and having the compensation at once assessed upon the profits the claimant was then making, allowed the matter to stand over for two years. But so does the claimant; he might have applied to a court of law, and insisted upon the company proceeding with the purchase at the end of the six months, as was held in *Morgan* v. *Metropolitan Railway Company*. (1) Instead of doing this, he holds by, and then claims, not only compensation for the value of his interest in the premises and goodwill, but also in respect of the depreciation in his profits, during the two years since the company should have taken possession, caused by the works of the railway and the pulling down of the neighbouring houses. He cannot claim both the value of his interest and goodwill in the premises at the time the company gave him notice, and also for depreciation in the value of such interest caused by the company's works, and the consequent loss of profits; the latter was the result of his own act, for it was his own fault that he continued to carry on the business on the premises after the six months had expired. It is quite clear therefore that the magistrate was bound to exclude this item, not only on the construction of the Lands Clauses Consolidation Act, but also with regard to the circumstances of the case. The rule must therefore be discharged.

LUSH, J. The precise point decided in *Rex* v. *London Dock Company* (2) was that this very item of claim could not be supported as injury to the interest of the occupier of a public-house; and without the authority of that case I should have no doubt that the claimant is not entitled to claim compensation in respect of this depreciation.

HANNEN, J. It is very desirable to adhere strictly to the rule that that only is subject of compensation under these statutes, which would have been the subject of an action if the company had acted without statutory powers. Now, it is clear that no action would lie by persons whose business is deteriorated by reason of

(1) Law Rep. 3 C. P. 553. (2) 5 A. & E. 163.

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some one having purchased and pulled down the neighbouring houses.

HAYES, J., concurred.

Rule discharged.

Attorneys for claimant: *Swann & Co.*

Attorneys for company: *Baxter, Rose, Norton, & Co.*

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Jan. 15.

SHEPHERD *v.* HARRISON AND ANOTHER.

Principal and Agent to buy—Consignor and Consignee—Bill of Lading—Where Property in Goods Shipped is intended to remain in Consignor.

The plaintiff in England sent an order to P. & Co., at Pernambuco, to buy cotton for him within certain limits. They bought cotton on account of the plaintiff, and shipped it in the defendants' vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was taken deliverable to P. & Co.'s order or assigns, paying freight. P. & Co. wrote to the plaintiff advising the shipment, and price and quality of the cotton; and saying, "Enclosed please find invoice and bill of lading; we have drawn upon you for the amount in favour of our agents, to which we beg your protection." The invoice was sent direct to the plaintiff; but the bill of lading (which had been indorsed in blank by P. & Co.), was sent with the bill of exchange to P. & Co.'s agents in England. The agents wrote to the plaintiff enclosing the two documents, and requesting his protection to the draft. The plaintiff retained the bill of lading, but returned the bill of exchange unaccepted on the ground that P. & Co. had not complied with the plaintiff's order. The plaintiff presented the bill of lading to the defendants, but they, having been informed of the circumstances under which the plaintiff held it, refused to deliver the cotton to him, saying they should deliver it to P. & Co.'s agents under a duplicate bill of lading which they had retained. On a case stating the above facts, the Court having power to draw inferences of fact:—

Held, that the inference to be drawn was, that it was the intention of P. & Co. that the property in the cotton should not pass to the plaintiff until he had accepted the bill of exchange; that no property, therefore, passed to the plaintiff, and the defendants were right in refusing to deliver to him.

DECLARATION for the conversion of 200 bales of cotton.

Pleas: 1. Not Guilty. 2. That the goods were not the plaintiff's. Issue thereon.

At the trial before Mellor, J., at the Manchester spring assizes, 1868, a verdict was entered by consent for the plaintiff for 1251*l.* 13*s.* 8*d.*, subject to the opinion of the Court upon a case of which the following is the substance:—

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The plaintiff is a cotton and general merchant, carrying on business at Manchester under the style of John Shepherd & Co.

The defendants are the owners of the screw-steamer *Olinda*, of Liverpool.

Paton, Nash, & Co., are merchants at Pernambuco in the Brazils, and George Paton & Co., who carry on business at Liverpool as merchants, are the Liverpool correspondents of Paton, Nash, & Co.

Before April, 1866, several transactions had taken place between the plaintiff and Paton, Nash, & Co. In all these (except upon one occasion, in 1865, when Paton, Nash, & Co., purchased cotton for the plaintiff) Paton, Nash, & Co., acted as agents for the sale of goods consigned to them by the plaintiff. In the letter of Paton, Nash, & Co., to the plaintiff, announcing the purchase on his account, in 1865, and that they had forwarded the cotton by the *Spray*, they said, "By the English steamer of 13th prox. we shall send bill of lading and value on you for cost." And George Paton & Co., afterwards wrote to the plaintiff: "Herewith we beg to hand you bill lading of 240 bags cotton per *Spray*. We presume our Pernambuco friends have made a mistake in sending it under cover to us. We also enclose draft on your good selves for 2072*l.* 9*s.* 6*d.*, which we will thank you to return with the needful."

In April, 1866, the plaintiff sent to Paton, Nash, & Co., a letter enclosing an order to buy for him, not exceeding 1000 bales of cotton, firsts, with from 250 to 300 seconds, or a proportionate less quantity of each at a certain price. This order was not executed by them; and on the 7th of September, 1867, the plaintiff sent another order for the same amount as to quantity but at a less price, to which Paton, Nash, & Co. replied on the 28th of September, 1867, acknowledging the order, and adding "You do not mention whether part of the order is to go against your funds lying here, but we suppose you intend it as a remittance." Further correspondence ensued, the plaintiff reducing his limit as to price owing to falls in the market; and in a letter of the 25th of October, 1867, he wrote, "Pray don't make the mistake you did before about our funds in your hands; they never were intended to be applied to pay for cotton purchases but to wait instructions."

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On the 5th of October, 1867, 747 bales of cotton had been purchased by Paton, Nash, & Co., on account of the plaintiff, and they wrote on that day saying what they had purchased, adding "On reading over your order again, we are impressed that you wish us to draw for the amount of invoice and not to deduct net proceeds in our hands, and we therefore shall value upon you on forwarding bill of lading." They also wrote another letter to the plaintiff the same day: "We beg now to inclose invoices of 339 bales cotton per *Capella*, costing 1616*l.* 8*s.* 8*d.*, and 208 ditto by *La Plata*, costing 883*l.* 7*s.* 1*d.* We have drawn upon you, as per note at foot, for the sum to which we beg your protection. We are afraid the *Capella* will not be able to take the other 200 bales, therefore it will be as well to insure per steamer or sailing vessel. Note of drafts, No. 926, favour of Messrs. G. Paton & Co., 1616*l.* 8*s.* 8*d.*; No. 927, do., 883*l.* 7*s.* 1*d.* The bills lading will be handed to you by Messrs. G. Paton & Co."

The invoices were made out "on account and risk of Messrs. John Shepherd & Co." These two lots were duly received by the plaintiff, under bills of lading, which were forwarded by Paton, Nash, & Co., to G. Paton & Co., and by them to the plaintiff, together with the two bills of exchange, with a letter saying: "We also inclose bills for 1616*l.* 8*s.* 8*d.* and 883*l.* 7*s.* 1*d.* respectively, to which please do the needful, and return to us in course." The plaintiff accepted the bills, and returned them to G. Paton & Co., in a letter of the 18th of November, 1867, saying, as to one of the lots, "with the reservation as to the mediums and seconds not being bought according to our instructions. In case, therefore, of any loss arising from the sale of these, we must claim against you." A long correspondence ensued between the plaintiff and G. Paton & Co. as to whether or not the plaintiff's order had been complied with. The plaintiff paid the two bills at maturity.

The remaining 200 bales purchased by Paton, Nash, & Co., were shipped by them in defendant's screw-steamer, the *Olinda*, and they wrote to the plaintiff on the 12th of November, 1867: "Enclosed please find invoice and bill of lading of 200 bales cotton, shipped per *Olinda*, S.S., costing 861*l.* 2*s.* 7*d.* at 21¼, Rs. 9725. 696, and which we hope may prove correct and satisfactory. We

have advanced the captain of the *Capella* 55*l.* 6*s.* 6*d.* as per receipt enclosed, to be deducted from the freight on your cotton, and on which you have 5 per cent. commission, and insurance 2*l.* 15*s.* 4*d.* to cover the advance. We have, therefore, drawn upon you for 916*l.* 9*s.* 1*d.*, draft No. 935, favour of Geo. Paton & Co., to which we beg your protection."

The sum of 916*l.* 9*s.* 1*d.* was arrived at by adding to 861*l.* 2*s.* 7*d.* (the price of the 200 bales), 55*l.* 6*s.* 6*d.*, which had been advanced by Paton, Nash, & Co., to the captain of the *Capella*, and the plaintiff, when the cotton, ex *Capella*, was delivered to him, paid the freight, less 55*l.* 6*s.* 6*d.*

The above letter and the invoice were forwarded by Paton, Nash, & Co., from Pernambuco direct to the plaintiff. The invoice was headed "Invoice of 200 bales of cotton shipped per *Olinda*, S.S., for Liverpool, on account and risk of Messrs. John Shepherd & Co." The bill of exchange and bill of lading mentioned in the letter were forwarded by Paton, Nash, & Co., not to the plaintiff, but to G. Paton & Co., who sent them forward to the plaintiff on the arrival of the *Olinda* at Liverpool on the 5th of December, 1867, in the following letter of that date: "Our Pernambuco letters to 12th ult. are just to hand, and we beg to enclose bill of lading for 200 bales cotton shipped by Messrs. Paton, Nash, & Co., per *Olinda*, S.S., on your account. We hand also their draft on your good selves for cost of the cotton, to which we beg your protection (916*l.* 9*s.* 1*d.*)"

The bill of lading was "Shipped on board the *Olinda*, &c., by Paton, Nash, & Co., 200 bags, containing 920 arrobas, and 4 lbs. net weight of cotton . . . . . unto order, or to his or their assigns, he or they paying freight on delivery in cash, without deduction, at the rate of $\frac{3}{4}d.$ sterling per lb. net weight," and was indorsed "Pernambuco, 13th November, 1867. Paton, Nash, & Co."

The plaintiff replied to G. Paton & Co.'s letter as follows: "6th December, 1867. Your favour of yesterday is received, with inclosures. On reference to invoices and bills of exchange which we have accepted, we find that they have been drawn in excess of price mentioned in order; there is also a quantity styled 'mediums' that we did not order at all!! These, with the hostile position you

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have taken with regard to the 208 bales ex *La Plata*, stand in the way of our accepting the bill of exchange now enclosed. We shall place the 200 bales ex *Olinda* in another broker's hands, and as soon as we learn, we shall inform you their opinion of them."

The plaintiff accordingly retained the bill of lading, and returned the bill of exchange unaccepted; and it was thereupon protested by G. Paton & Co.

The plaintiff forwarded the bill of lading for the 200 bales ex *Olinda* to his Liverpool brokers, Eason, Barry, & Co, with instructions to pay the freight and obtain the cotton. They accordingly presented the bill of lading, paid 90*l.*, the approximate freight of the 200 bales, and obtained the defendants' signature to a delivery order on the master porter on the 9th of December, 1867. At this time the defendants knew nothing of the above circumstances under which the plaintiff held the bill of lading; but G. Paton & Co. having made a communication to the defendants, and demanded possession of the cotton under a duplicate bill of lading which they held, and having indemnified the defendants, they refused, on the 10th of December, to deliver the cotton to Eason, Barry, & Co., saying they should deliver to G. Paton & Co.

From the time the order for the 1000 bales was given up to the time of the commencement of this action, Paton, Nash, & Co. had in their hands at Perambuco money and goods of the plaintiff to the amount of 3000*l.*, or thereabouts.

It was agreed that the Court should have power to draw any inferences of fact which a jury might draw.

The question for the Court was, whether the plaintiff is entitled to recover in this action or not.

Quain, Q.C. (*Jordan* with him), for the plaintiff. The question is whether, looking at the correspondence and the facts, the property in the cotton passed to the plaintiff, or whether it was a condition precedent that he should accept the bill of exchange for the amount. If the former, the plaintiff is entitled to recover; if the latter, the defendants, the shipowners, were justified in refusing to let the plaintiff have the cotton, and in handing it over to the agents of Paton, Nash, & Co., under the duplicate bill of lading. No doubt the bill of lading makes the cotton deliverable to con-

signors' order, and that circumstance was relied on in the judgment in *Turner* v. *Liverpool Docks Trustees* (1), as shewing the intention that the property should not pass at once to the consignees; but the circumstances of that case differ materially from the present; there the bill of exchange was discounted or sold by the consignors, and the bill of lading specially indorsed was handed to the purchasers as a security; in the present case the bill of lading was indorsed in blank at Pernambuco, and sent with the bill of exchange to the agents of the consignors, and by them handed over to the plaintiff; the passage in the letter of the agents in 1865, shews that this was a mistake, and the transaction, therefore, was precisely the same as if the bill of exchange and bill of lading had been sent direct to the plaintiff. There was the greatest confidence evidently reposed in the plaintiff by both Paton, Nash, & Co., and their agents; and it is only in time of peril and suspicion that the practice obtains of attaching the bill of exchange to the bill of lading, and making the acceptance or even payment of the one a condition precedent to the delivery of the other: see per Crompton, J., in *Gurney* v. *Behrend* (2); but then this intention is shewn, as Lord Campbell points out, by attaching the two documents. In *Wilmshurst* v. *Bowker* (3) the facts were very similar to the present, and the Court of Exchequer Chamber unanimously reversed a considered judgment of the Common Pleas, and held that by the delivery of goods by the vendor to the master of a vessel for account and at the risk of the vendee (as in the present case), and by the transmission of the indorsed bill of lading with the bill of exchange to the vendee, the property at once passed to the vendee, and the acceptance of the bill of exchange was only a condition subsequent, making the default of acceptance only a breach of contract.

[HANNEN, J. *Moakes* v. *Nicolson* (4) shews it is a question of intention.]

No doubt; and *Key* v. *Cotesworth* (5) shews that the inference to be drawn is that the acceptance of the bill of exchange was not a condition precedent.

(1) 6 Ex. 543; 20 L. J. (Ex.) 393.
(2) 3 E. & B. at pp. 630, 631.
(3) 7 M. & G. 882.
(4) 19 C. B. (N.S.) 290; 34 L. J. (C.P.) 273.
(5) 7 Ex. 595; 22 L. J. (Ex.) 4.

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Holker, Q.C., for the defendants. The question is, what was the intention of Paton, Nash, & Co., as evidenced by what they did and wrote; and so far from it being their practice to transmit the bill of exchange and bill of lading direct to the plaintiff, both on the former occasion and in the present instance they send the documents to their agents, for the obvious purpose that they may get the bill of exchange accepted before parting with the bill of lading; and the fact of the agents having parted with the bill of lading without getting the acceptance cannot affect the case. In all the cases in which the property has been held to pass without the acceptance of the bill of exchange, the bill of lading has been indorsed to and sent direct to the purchasers: see Maclachlan on Shipping, p. 343. Here the bill of lading was indorsed in blank, and sent to the agents not of the plaintiff but of Paton, Nash, & Co. *Brandt* v. *Bowlby* (1) is undistinguishable from the present case. *Wait* v. *Baker* (2), *Van Casteel* v. *Booker* (3), and *Jenkyns* v. *Brown* (4), are also in point for the defendants. In the last case the Court say that the taking of a bill of lading deliverable to the shipper's own order is nearly conclusive evidence that the property was not intended to pass. Stress has been laid on the invoice being made out on account and at the risk of the plaintiff; but that fact existed in *Turner* v. *Liverpool Docks Trustees* (5), and was held immaterial to affect the question. That case is even stronger than the present, as the delivery there was on board the vendees' own ship. But the fact of the bill of lading being made to vendors' order was held to shew almost conclusively the intention not to part with the jus disponendi. *Ellershaw* v. *Magniac* (6) is to the same effect; so also is *Sheridan* v. *New Quay Company*. (7)

Quain, Q.C., in reply. The material fact has been overlooked that during the whole of the transaction, Paton, Nash, & Co., had in their hands goods or money of the plaintiff to the extent of 3000*l*. *Brandt* v. *Bowlby* (1) is distinguishable; there the bill of lading sent to the purchaser had not been indorsed. In *Wait*

(1) 2 B. & Ad. 932.
(2) 2 Ex. 1; 17 L. J. (Ex.) 307.
(3) 2 Ex. 691; 18 L. J. (Ex.) 9.
(4) 14 Q. B. 496, 502; 19 L. J. (Q.B.) 286, 288.
(5) 6 Ex. 543; 20 L. J. (Ex.) 393.
(6) 6 Ex. 570, n.
(7) 4 C. B. (N.S.) 618; 28 L. J. (C.P.) 58.

v. *Baker* (1) and *Jenkyns* v. *Brown* (2), the indorsed bill of lading had been handed to third persons as a security for the payment of the bills of exchange; and in all the other cases cited for the defendants, the bills of lading had been so dealt with by the vendors.

COCKBURN, C.J. I am of opinion that our judgment must be for the defendants. I agree that, in one point of view in which the case can be looked at, the question is one of intention, viz., what was the intention of Paton & Co., of Pernambuco, in sending over this bill of lading? I agree that this is a matter as to which we, having power to draw inferences of fact, must make up our minds upon, and decide, but I think we cannot decide it independently of the authorities to which our attention has been called. I think those authorities are conclusive as to the inference which we ought to draw, independently of what may be my own opinion as to the inference to be drawn from the facts we have before us.

Cases were cited by Mr. Quain with a view of pointing out the inference we ought to draw in an opposite conclusion to that which I feel myself compelled to draw. Those cases are certainly very strong indeed, and conclusive to shew, supposing the consignor of goods sends them to this country accompanied by bills of lading and bills of exchange which are to be accepted by the consignee of the goods as the consideration for the consignment, that where the consignor sends those documents direct to the consignee that ought to lead to the inference, and only properly lead to the inference, that he intended the consignee should have at once the disposal of the property and possession of the goods consigned, leaving to him, as a matter simply of obligation under the contract, to return the bills of exchange accepted, not as a condition precedent to the property vesting, but simply as a matter of contract. But, on the other hand, the authorities are equally good, to my mind, to shew, where the consignor sends the bill of lading to an agent in this country to be by him handed over to the consignee, and accompanies that with bills of exchange to be accepted by the consignee, that that indicates a different intention, viz., that the handing over the bill of lading and the

(1) 2 Ex. 1; 17 L. J. (Ex.) 307. (2) 14 Q. B. 496; 19 L. J. (Q.B.) 286.

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acceptance of the bill or bills of exchange should be concurrent parts of one and the same transaction.

The case of *Brandt* v. *Bowlby* (1), to which our attention was called by Mr. Holker, appears to me to be conclusive of the present case. That case has not the additional circumstances which Mr. Quain referred to as being the reason of the decision in the case of *Turner* v. *Liverpool Docks Trustees* (2), and the other cases cited by Mr. Holker. There is no such circumstance in the case of *Brandt* v. *Bowlby* (1) as the parting with the bills of exchange and bills of lading, and handing them to the transferee of those bills. All that happened in that case was this,—The consignor of the goods sends to the consignee, with the usual invoice, an unindorsed bill of lading. He sends an indorsed bill of lading, as in the present case, to his agent, accompanied by the bill of exchange, to be by the agent presented to the consignee for acceptance, the bill of lading to be delivered to the consignee at the same time. Now, that was considered as conclusive to shew that the consignor did not intend that the property should vest at once in the consignee, but only upon the condition of the acceptance of the bill of exchange being accomplished. It is true that in that case there was the additional circumstance, which was relied on as by no means an immaterial one to distinguish that case from this, that an unindorsed bill of lading was sent to the consignee. Here we have as a fact, not an unindorsed bill of lading sent to the consignee, but no bill of lading at all sent. I see no difference in principle between sending a bill of lading which, not being indorsed, is inoperative and amounts to nothing, and not sending a bill of lading at all. The case of *Brandt* v. *Bowlby* (1) therefore seems to be on all-fours with the present, and conclusive of it. I think also, as to the other cases cited by Mr. Holker, the additional circumstance of the bills of exchange drawn on the consignee having been made over to a third party for consideration makes no difference. All that can be said is, that a consignor who sends a cargo to England, and draws bills of exchange on his consignee, and who makes over his right to a third party, had a right to retain the bill of lading until the bill of exchange has been accepted; and, until the bill is accepted, it would be the duty of

(1) 2 B. & Ad. 932. (2) 6 Ex. 543; 20 L. J. (Ex.) 393.

the third party not to hand over the bill of lading, because the indorsement of the bill of exchange and the handing of the bill of lading to him is putting the third party in the place of the original party, the consignor. I think, therefore, we are concluded by those cases.

How those cases would have been decided, if presented in a form which occurred to my mind more than once, is another thing; but it will be obvious that, to do justice between the parties, it was right that the bills of exchange not having been accepted by the party to whom the goods were consigned, the consignor should not be prejudiced by having the bill of lading operate to transfer the property for which he has not got any consideration or equivalent. Those decisions did justice between the parties under the circumstances which presented themselves.

The question might have been presented in another form. If it is true that until the bills of exchange are accepted as the consideration for handing over the bills of lading the property does not pass, I am very much afraid, if the property perished, it would be very questionable whether the consignor, who has bought the goods upon the order of his principal, and who has paid his money for them, might not be unable to recover the money. I confess I should prefer to put the case upon a different ground, which would be equally favourable to the defendants here, and which seems to me to secure the rights of all parties more effectually. That consideration is an additional reason in my mind for deciding this case in favour of the defendants. The consignor is acting in the foreign country as the agent, buying goods for a principal here, not as the purchaser of goods who sells on his own account to a consignee in this country. Upon the agent buying them he at once ships the goods on account of and risk of his principal here; and he calls upon that principal to insure the goods. And it strikes me, as a possible view of the case, that it may be well contended that the property in the goods would at once pass to the consignee; but then, inasmuch as the agent has paid the money by means of which the goods have been obtained for the principal, the case might be treated as altogether analogous to the case of seller and buyer; and as the seller of goods has a lien upon them for the price until he is paid, so the agent, laying out

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his money on the goods for his principal, ought by analogy to have a lien upon the goods until he has been repaid the money which he has laid out in the purchase of them. Apply that to the present facts, Paton & Co. at Pernambuco, having, as the agents of the plaintiff, purchased goods for him, and laid out their money for him, although the property in these goods may pass to the principal, are entitled to hold possession of those goods against him, until they have been recouped the amount which they have laid out in order to acquire those goods for him. It is the same thing if, instead of taking the price of the goods in money, they agree to take bills of exchange, because they would equally be entitled to have a lien upon the goods until they are satisfied either in the shape of money or negotiable bills of exchange. In that point of view the defendants would be entitled to say to the plaintiff, "Although the property in these goods has passed to you, the persons who bought these goods for you and laid out their money in the purchase of them, are entitled to hold possession of the goods as against the right which otherwise would attach to the property, and as against you they are entitled to be recouped the money which they have laid out, before the goods are handed over to you." We are not driven to look at the case in the present instance as a case of a lien by which the parties are entitled to retain possession of the goods until they are paid the amount which they have laid out, for I think the case is concluded by the authorities cited on the part of the defendants by Mr. Holker, and therefore our judgment will be for the defendants.

MELLOR, J. I am of the same opinion. It appears with reference to the interest of Paton & Co., of Pernambuco, in these goods, that the substance of the transaction was this, although they purchased them on account of a principal at Manchester, yet still from the very nature of the things, they, having found the money, must be taken to be buying for him on a condition or promise on his part of furnishing them with funds, that is to say, by accepting bills of exchange for the money which they had advanced on his account. The case may very shortly be disposed of on the ground that there are one or two facts which appear to me according to the decision in the case of *Turner* v. *Liverpool*

Docks Trustees (1), to be conclusive. One is the form of the bill of lading which is made to the consignors or their order, and it is indorsed in blank and sent to their agents, which is strong to shew that they certainly did not intend it to be handed over to the Messrs. Shepherd, of Manchester, without the bill being accepted which they sent with it. I cannot find out any reason why they should send the bill of lading so indorsed accompanied by the draft unless it was that they might have the bill of exchange accepted at the time when the bill of lading was handed over. This appears to me, according to the judgment delivered by Patteson, J., in *Turner* v. *Liverpool Docks Trustees* (2), to be a governing fact; against which it appears to me there is nothing in the case to outweigh it. Although in some of the cases cited there were additional facts which might afford additional evidence of intention on the part of the consignors, yet the absence of these facts do not appear to me at all to affect the ground on which our judgment ought to proceed. The above facts appear pregnant in themselves, and I can come to no other conclusion than that it was the intention of the consignors in sending the bill of lading so indorsed accompanied by the bill of exchange to their agents to retain the right of property until the bill was accepted. Then all that the agents do is this. On receiving the bill of lading and the draft they send them at once to Mr. Shepherd, accompanied by this letter: "Our Pernambuco letters to the 12th ult. are to hand, and we beg to enclose bill of lading of 200 bales of cotton shipped by Paton, Nash, & Co., on your account. We hand also their draft on your—good—selves for cost of cotton to which we beg your protection." Now, I think the fair inference is this, that these gentlemen had great confidence in the plaintiff, and they therefore do not say, "Accept the draft, and then you shall have the bill of lading," but "We send the draft for your acceptance, together with the bill of lading." I think the meaning of that is, "We send you the bill of lading, relying that you will accept the draft." I think when the plaintiff did not accept the draft, the agents were justified in what they did in preventing the delivering the cotton to the plaintiff's agents in Liverpool; and that the

(1) 6 Ex. 543; 20 L. J. (Ex.) 393.
(2) 6 Ex. at p. 567; 20 L. J. (Ex.) at pp. 399, 400.

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defendants were justified in obeying the orders of Paton & Co.'s agents.

HANNEN, J., concurred.

HAYES, J. I am entirely of the same opinion. It would make no difference whether this were the case of principal and agent, or buyer and a seller. There is no doubt that if it were the case of an unpaid vendor he would want the money, and that circumstance would be clear proof to shew he did not intend to part with the goods until he took money or security for it. Here the agents in this country did not insist on having the bill accepted before handing over the bill of lading, because they knew the parties were respectable. When a person parts, or is about to part with his goods, he expects to get a consideration for them; and that being so, in this case instead of sending the bill of lading to the person to whom they send the invoice, Paton & Co. send the invoice to the person for whom they have bought, and they send the bill of lading to their own agents with the bill of exchange. What is that for? Why, to keep control over the property until the transaction is closed by the bill of exchange being accepted, and the bill of lading handed over in return. If the plaintiff had gone to the Liverpool house and said, "I do not mean to accept this bill. I do not think your principals have bought the goods according to my order, but I will trouble you to give me the bill of lading," nobody can doubt that the answer would have been, "We cannot let you have it." Does not this shew what really was the intention? It seems to me, therefore, that as soon as Paton and Co.'s agents found the bill of exchange was not to be accepted, they acted properly in issuing the duplicate bill of lading which they had kept in hand, and so obtaining possession of the goods.

The effect of the transaction appears to me very clear; and *Turner* v. *Liverpool Docks Trustees* (1), and the other cases referred to, are authorities that judgment ought to be for the defendants.

Judgment for the defendants.

Attorneys for plaintiff: *Johnson & Weatheralls.*

Attorneys for defendants: *Chester & Urquhart, for Lace, Banner, & Co., Liverpool.*

(1) 6 Ex. 543; 20 L. J. (Ex.) 393.

PALMER'S SHIPBUILDING AND IRON COMPANY, APPELLANTS; CHAYTOR, RESPONDENT.

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Jan. 20.

Factory Acts Extension Act, 1867 (30 & 31 *Vict. c.* 103), *s.* 3, *subs.* 5, 7—"*Factory*"—"*Making of an Article.*"

By 30 & 31 Vict. c. 103, s. 3, "factory" shall mean . . . 5, "any premises in which steam, water, or other mechanical power is used for moving machinery employed . . . (b), in the manufacture of any article of metal not being machinery."

A company carried on very large works, comprising the business of blast furnaces, iron rolling mills, engine building, and iron shipbuilding, in all its branches. The whole of the several branches communicated, and were open from one end to the other, and were within one common boundary. A boy was employed as a rivet-boy, and in the department where he worked steam machinery was in use for cutting and shaping iron plates, and rivets were heated there; both the plates and rivets were used in the manufacture of a ship. The company having been convicted of having employed the boy in a "factory" beyond the statutable number of hours:—

Held, that the department in which the boy was employed was a "factory" within the above definition; and that the conviction was therefore right.

Semble, that a ship is not "an article" within the meaning of s. 3, subs. 7, which defines "factory" as "any premises in which fifty or more persons are employed in any manufacturing process," "manufacturing process" being defined as "any manual labour incidental to the making of any article or part of an article."

CASE stated by Justices of the county of Durham under 20 & 21 Vict. c. 43.

The respondent, a sub-inspector of factories, laid an information against the appellants, alleging that the appellants' company had offended against 7 Vict. c. 15, "An Act to amend the laws relating to labour in factories," as amended by 13 & 14 Vict. c. 54, "An Act to amend the Acts relating to labour in factories," by 16 & 17 Vict. c. 104, "An Act further to regulate the employment of children in factories," and 30 & 31 Vict. c. 103, "The Factory Acts Extension Act, 1867," forasmuch as they, on the 8th of April, 1868, at the parish of Jarrow, being then and there the occupiers of a certain shipbuilding factory, the same being a factory within the true intent and meaning of the said Acts, did employ in their said factory a certain child under the age of eleven years, to wit, Smith Kennedy, for more than six and a half hours per day.

At the hearing the appellants admitted the age and employment

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of the child Smith Kennedy, as alleged in the information, and that, if the justices held their works to be a factory within the meaning of the statutes (which they, the appellants, denied), then that they ought to be convicted.

The company carry on very large works, all situate in the parish of Jarrow, and comprising the business of blast furnaces, iron rolling mills, engine building, and iron shipbuilding, in all its branches. The whole of the several branches communicate, and are open from one end to the other, and are confined within one common boundary. Steam machinery is used for the purposes of the company, and in each department more than fifty persons are employed. Smith Kennedy, the child in question, was employed as a rivet boy, and in the department where he worked steam machinery was in use for cutting and shaping iron plates, and rivets were heated there. The manufactory of machinery does not go on there, but the manufacture of a ship does. Both the plates and rivets were used therein. Although the works consisted of various departments, which might of course have been carried on separately, they did in fact form one trade establishment of the same company. Distinct managers are employed; separate accounts are kept; and the wages are paid separately in each department, and each department debits and credits the other with work done. These accounts are afterwards brought into one statement, and one dividend is payable in respect of the whole of the works. The several departments could be divided by doors, but are not. The appellants use iron not manufactured by themselves, and they sell iron from their furnace and from their rolling mills; other portions of the iron manufactured by them go into the ships built by them on the premises in question. Both cast and wrought iron is used in these ships, but the castings are not done in the shipbuilding department.

It was contended for the appellants that their works in question are not a factory within the statutes, particularly 30 & 31 Vict. c. 103, upon the ground that a ship was not an "article" within their meaning. It was said that the statutes were not intended to apply to iron shipbuilding yards which are open to the air, and where such a large and bulky thing as a ship is manufactured, but to the production of small articles in confined factories.

The justices found that the appellants' premises are a factory and one trade establishment within the statutes, and also that articles of metal have been made there by steam power; and they convicted the appellants in a penalty of 20s. and costs.

If the Court should be of opinion that the appellants' premises in question are not a factory within the meaning of the statutes, then the conviction was to be quashed or the information dismissed; but if the Court should be of opinion that the conviction was right in point of law then the same should stand.

Mellish, Q.C. (*Beresford* with him), for the appellants. It is expressly found that the department in which the boy was employed was part of the process of shipbuilding; but a ship is not an "article" within the meaning of 30 & 31 Vict. c. 103, s. 3 (1),

(1) 30 & 31 Vict. c. 103, s. 3:—"For the purposes of this Act the following words shall in this Act and in the Acts incorporated herewith, hereinafter included under the expression this Act, have the meanings hereby applied to them, unless there is something in the context inconsistent with such meanings; that is to say, 'Factory' shall mean as follows:—1. Any blast furnace or other furnace or premises in or on which the process of smelting or otherwise obtaining any metal from the ores is carried on (which furnace or premises are hereinafter referred to as a blast furnace). 2. Any copper mill. 3. Any mill, forge, or other premises in or on which any process is carried on for converting iron into malleable iron, steel, or tin plate, or for otherwise making or converting steel (which mills, forges, and other premises are hereinafter referred to as iron mills). 4. Iron foundries, copper foundries, brass foundries, and premises or places in which the process of founding or casting any metal is carried on. 5. Any premises in which steam, water, or other mechanical power is used for moving machinery is employed, (a) In the manufacture of machinery. (b) In the manufacture of any article of metal not being machinery. (c) In the manufacture of india-rubber or gutta-percha, or articles made wholly or partly of india-rubber or gutta-percha. 6. Any premises in which any of the following manufactures or processes are carried on, namely, (a) paper manufacture; (b) glass manufacture; (c) tobacco manufacture; (d) letterpress printing; (e) book-binding. 7. Any premises, whether adjoining or separate, in the same occupation, situate in the same city, town, parish, or place, and constituting one trade establishment in or within the precincts of which fifty or more persons are employed in any manufacturing process; and every part of a factory shall be deemed to be a factory, except such part, if any, as is used exclusively as a dwelling: 'Manufacturing process' shall mean any manual labour exercised by way of trade, or for purposes of gain, in or incidental to the making of any article or part of an article, or in or incidental to the altering, repairing, ornamenting, finishing, or otherwise adapting for sale any article."

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and therefore the department in which the boy was employed is not a "factory" within any of the definitions given by this section.

Sir R. P. Collier, A. G. (*Sir J. D. Coleridge, S. G.*, and *Archibald* with him), for the appellant. A ship is an article; if not, what is it? and therefore the case comes within s. 3, subs. 7. But it is not necessary to argue that, because in the department in which the boy was employed iron plates were cut and shaped, and that is clearly the manufacture of "an article of metal" within s. 3, subs. 5. (b)

Beresford, in reply. What the justices intended to reserve for the Court was, whether shipbuilding premises were a "factory."

COCKBURN, C.J. I cannot bring myself to think that such a process as the making or rather building of a ship was intended by such a definition of "manufacturing process" as is given in subs. 7, viz., "any manual labour incidental to the making of any *article* or part of an article." "Article" cannot surely be meant to apply to a ship; and I should hesitate very much before I could hold that a boy was employed in a "factory" merely because he was employed in some department of shipbuilding. But an iron plate is an article of metal, and not the less so that it is used in shipbuilding, and the shaping of the plate is part of the manufacture. The department, therefore, in which the boy was employed comes within the definition of "factory" given in subs. 5 (b), and this conviction was therefore right.

HAYES, J., concurred.

Judgment for the respondent.

Attorneys for appellants: *Shum & Crossman.*
Attorneys for respondent: *The Solicitors to the Treasury.*

WREN AND ANOTHER *v.* WEILD.

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Jan. 25.

Practice—Particulars by Defendant—Action for Slander of Title.

In an action, charging that the defendant falsely and maliciously wrote to and told persons who had bought certain machines of the plaintiffs, that the machines were infringements of his, the defendant's, patents, the defendant having pleaded not guilty, the Court ordered the defendant to deliver particulars, shewing in what parts the plaintiffs' machines were an infringement of the defendant's patents, and pointing out, by reference to the page and line of the defendant's specifications, which part of the inventions therein described he alleged to have been infringed.

THE declaration in this action alleged that the plaintiffs were machine makers at Manchester, and lawfully made and sold spooling machines, and charged, in substance in eight counts, that the defendant falsely and maliciously wrote or said to various persons who had purchased or were intending to purchase the machines of the plaintiffs, that the machines sold by the plaintiffs were infringements of the defendant's patents, and that the defendant claimed royalties for the use of the machine, and that if they used the machines without paying him royalties he should take legal proceedings, concluding with special damage by loss of custom and trade profits.

Plea: Not guilty.

Webster, Q.C. (with him *Baylis*), moved, on behalf of the plaintiffs, for a rule calling on the defendant to shew cause,—"why he should not, within fourteen days, deliver to the plaintiffs particulars, shewing in what part or parts the plaintiffs' spooling machines mentioned in the declaration are an infringement of the defendant's patents of 1858 and 1860, and pointing out, by reference to the page and line of the defendant's specifications, which part of the inventions therein described he alleges to have been infringed." The particulars now sought were applied for in Michaelmas Term in the shape of interrogatories, but the Court suggested that an application for particulars was the proper course. The issue in the present form of action, to which the plaintiffs have been driven by the defendant, is precisely the same as if the defendant had brought an action against the plaintiffs for the infringement

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of his patents; and in common justice they are entitled to be told by particulars, as they would have been told if they were defendants, what part of the defendant's patents he alleges that they have infringed.

J. J. Aston shewed cause in the first instance. This is a perfectly novel application; it is only in an action for the infringement of a patent or in proceedings by scire facias to repeal letters patent that particulars are to be delivered by the plaintiff, prosecutor, or defendant respectively, under s. 41 of the Patent Law Amendment Act, 1852 (15 & 16 Vict. c. 83).

PER CURIAM (Cockburn, C.J., Mellor and Hayes, JJ.). This is a perfectly reasonable application, and one which justice and convenience require should be granted; the defendant by the course he has pursued has driven the plaintiffs to take the initiative, and they ought to be in the same position as if the defendant had brought an action against them for the infringement of his patents. The rule will therefore be absolute as prayed.

Rule absolute.

Attorneys for plaintiffs: *Sharp & Ullithorne.*
Attorneys for defendant: *N. C. & C. Milne.*

Jan. 21.

SADLER *v.* SMITH.

Arbitrator, decision of, when final—Boat Race—Jurisdiction of Referee—Action to Recover Deposit.

The plaintiff deposited a stake with the defendant with a view to a race between the plaintiff and K., upon the terms "that the race was to be a right-away sculler's race, and the decision of the referee to be final." In such races, the start is made by the men themselves, but if they fail to start through default of either or both, the referee has power to interfere. There was a default in the start, and the referee, who was stationed at some distance from the starting post, ordered that K. should inform the plaintiff that if he did not start, K. was to row over the course without him. K. rowed over the course without having communicated this order to the plaintiff, or given him any opportunity of starting, and the referee, without inquiry or communication with the plaintiff, ordered the stakes to be paid to K. An action having been brought by the plaintiff to recover his deposit:—

Held, that as the order of the referee was conditional on its being communi-

cated to the plaintiff, the order not having been communicated, there never was such a start or race as was contemplated; the referee's jurisdiction to award the stakes, therefore, did not attach, and his decision was not final; and that the plaintiff was entitled to recover.

Aff'd by Ex Ch. 5 Q.B. 40

DECLARATION for money received by the defendant for the use of the plaintiff.

Pleas: 1. Never indebted. 2. That the plaintiff and one Kelley entered into an agreement as follows:—"Articles of agreement" between Kelley on the one part, and the plaintiff on the other part. "They hereby agree to row a right-away sculler's race from Putney to Mortlake; the start to take place between the aqueduct and the steamboat pier, on Wednesday, the 27th of November, for the sum of 300*l.* aside; the start to take place at half-past 2 P.M., ... to row according to the recognized rules of boat racing. The referee to be chosen at the last deposit, and whose decision shall be final. .... Either party failing to comply with these conditions to forfeit all money down." That the defendant received the money upon the terms mentioned in the agreement as stakeholder, to pay the money to the winner of the race according to the decision of the referee; that the referee was, in accordance with the terms of the agreement, chosen, and that the referee decided that Kelley was the winner of the race. Averment of all times and conditions, &c. necessary to entitle Kelley to receive, and the defendant to pay to Kelley the money claimed; and the defendant in accordance with the terms of the agreement, and according to the decision of the referee duly paid the money claimed to Kelley.

Issue thereon. (1)

At the trial before Cockburn, C.J., at the sittings in London after Hilary Term, 1868, it appeared that the plaintiff and Kelley, who was a waterman, agreed to row a sculler's race for 300*l.*

(1) There was also a special replication to the second plea, setting out the facts very much as they afterwards appeared in evidence, and alleging that by the recognized rules of boat races the referee had no jurisdiction until the race had commenced; that he had no power to interfere with the start, or to order a row over, and that as there, therefore, was no start and no race, Kelley was not the lawful winner of the race; of all of which the defendant had notice, and that the plaintiff demanded his stake back, before the defendant had paid it over to Kelley. Issue thereon. At the trial, the power of the referee to interfere as he did seems to have been conceded. See the judgment of the Chief Justice, post, p. 219.

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aside, according to the terms of the written agreement set out in the second plea. The stakes were deposited with the defendant, and one Biffen was appointed referee. Evidence was also given that in a sculler's race between watermen, according to the modern practice, the men start themselves, but in the event of the men not starting, through default of either or both, the referee is entitled to interfere. On the 27th of November, 1867, the day fixed for the race, the parties started, but a foul having taken place, the referee ordered the men to row the race again the next day. On that day great delay and difficulty took place in the men starting themselves; and Kelley believing that the plaintiff did not intend to start rowed fifty or sixty yards to where the referee's steamer was, and complained to the referee, who then gave an order that Kelley should inform the plaintiff that if he did not start, Kelley was to row over the course without him. Kelley rowed back to the starting post and shouted, as he alleged, to the plaintiff that he had been ordered to row over the course. The plaintiff, however, denied that any one gave him any notice of the referee's order. Kelley then rowed over the course; and the referee without any further inquiry or communication with the plaintiff, decided that the stakes should be paid over to Kelley, and the defendant accordingly paid them to him.

The Chief Justice left the following questions to the jury:—1. Did Sadler intend to start? *A.* He did.—2. Had the referee, by actual observation or otherwise, the means of knowing whether Sadler intended to start or not? *A.* He had not.—3. The order of the referee being if Sadler would not start, Kelley should row over the course, and that this should be communicated to Sadler, was it so communicated? *A.* No.—4. Was a fair opportunity afforded to Sadler to start? *A.* No.

The Chief Justice directed a verdict for the plaintiff, giving the defendant leave to move to enter a nonsuit, or a verdict for the defendant, on the ground that the referee's decision was, for the purposes of this action, final.

A rule was obtained accordingly.

Jan. 18. *H. James,* and *Brickwood,* shewed cause. Under the facts found by the jury the referee's decision was not final. An

arbitrator has only jurisdiction over those matters that come properly before him, and after hearing both parties where there is any dispute as to facts. *Benbow* v. *Jones* (1) will be cited to the contrary, that a decision is final, however come to; but in that case there had, in effect, been an inquiry. *Re Brook and Others* (2) shews that, however summary proceedings may be by custom in particular cases, there must be an inquiry or a hearing, or the award is void. In the present case not only was there no inquiry, but it is clear that the referee decided on the mistaken supposition that his order had been complied with; and, in order to found his jurisdiction to decide who had won, there must have been a start and a race; and assuming (which is very doubtful) that it was competent to the referee to give the order he did as to the immediate start or the row over, that order was not complied with; consequently there was no race, and the referee's jurisdiction to award the stakes never arose. *Carr* v. *Martinson* (3) is directly in point. There the plaintiff and H. agreed to run a match between two horses on a given day, with a particular person as starter, and another as judge; the stakes were deposited with the defendant, "to be given up by the decision of the judge." On the day the plaintiff and H. were both ready, but the starter did not appear, H. on that ground refused to run the race. The judge held the objection not material, and the plaintiff's horse trotted over the course, and was declared by the judge to be the winner. An action was brought by the plaintiff to recover the whole stakes, and it was held that the race was never run according to the conditions, and therefore that the judge's jurisdiction never arose, and his decision was void. So here, the condition of the referee's order making the row over a race was never complied with, and his jurisdiction to award the stakes never arose. *Re Hall and Hinds* (4) shews that if a gross mistake is made by an arbitrator, the crassa negligentia may be equivalent to dolus malus, and render the award nugatory.

Jan. 21. *Garth, Q.C.*, and *Tennant*, in support of the rule. If the act of the referee in awarding the stakes to Kelley amounted

(1) 14 M. & W. 193.
(2) 16 C. B. (N.S.) 403; 33 L. J. (C.P.) 246.
(3) 1 E. & E. 456; 28 L. J. (Q.B.) 126.
(4) 2 M. & G. 847.

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to misconduct on his part, that may have been a sufficient ground for setting aside his decision; but misconduct of an arbitrator cannot be set up by way of plea in an action on the award, nor can it be set up by way of replication to the present plea: *Thorburn* v. *Barnes* (1); *Veale* v. *Warner*. (2) In *Re Hall and Hinds* (3) the award was set aside for a mistake of the arbitrator, on the ground that it was extremely doubtful whether, in an action upon the award itself, any defence could have been made. The referee has decided that Kelley won the race, and has ordered the stakes to be paid over to him; he is the judge of both fact and law; his decision is final, and although he may have arrived at his conclusion on imperfect evidence, it cannot be reviewed either by the jury or by the Court. In *Benbow* v. *Jones* (4) the conditions of the race were that no professional jockey should be allowed to ride, and all disputes should be decided by a steward, whose decision should be final. Before the race began, the steward informed the plaintiff that the rider of his horse was a professional jockey, and forbade him to ride in the race; notwithstanding this intimation, he rode and came in first. The steward declared the second horse to be the winner, and ordered the stakes to be handed over to the owner. There, although the steward had never decided the matter upon a hearing, the Court held his decision to be final. So here, if the referee acted bonâ fide upon the assumption that the communication was made to Sadler, it is immaterial whether it was made or not; his decision by the terms of the race is final and cannot be questioned. *Brown* v. *Overbury* (5) shews, that in the event of a decision by the stewards of a race, erroneous, but without fraud, the question cannot be reopened. So *Marryatt* v. *Broderick* (6), and *Evans* v. *Pratt* (7), decided that where a condition of the race is that the umpire's decision shall be final, it cannot afterwards be reviewed by a jury. *Carr* v. *Martinson* (8) is distinguishable; there by the terms of the race there was to be a starter and a judge, and obviously the jurisdiction of the judge did not arise until there was a proper start. Here, as soon as the

(1) Law Rep. 2 C. P. 384.
(2) 1 Wms. Saund. 327a, note (3).
(3) 2 M. & G. 847.
(4) 14 M. & W. 193.
(5) 11 Ex. 715; 25 L. J. (Ex.) 169.
(6) 2 M. & W. 369.
(7) 3 M. & G. 759.
(8) 1 E. & E. 456; 28 L. J. (Q.B.) 126.

parties have put themselves in position the referee's jurisdiction arose, and the question whether there was a start or not is within his jurisdiction; and he has virtually decided that there was a start and a race, of which Kelley was the winner.

COCKBURN, C.J. I am of opinion that this rule should be discharged. The action was brought to recover 300*l.* deposited with the defendant by the plaintiff, with a view to a race between him and a waterman of the name of Kelley, upon the terms and conditions contained in a written agreement, that this was to be a sculler's race, the winner to be entitled to the whole deposit, and the decision of the referee to be final. The referee has undoubtedly decided that the stakes should be awarded to Kelley, and if that decision is one which cannot be questioned, and which is conclusive, the plaintiff cannot recover in this action against the stakeholder. That is the question we have to determine.

Ante 215.

Now, according to the conditions of the race, as contained in the contract, when properly interpreted, the race was to begin by a start to be made by the men themselves—the referee was not to interfere in that start. Whether that is a convenient mode of commencing a race of that description may be very seriously questioned after the experience of this race; but it was a part of the contract, and therefore binding upon the men. We must assume however that, according to the true construction of this contract, if the men failed to start through the default of either or both, the referee would have authority to interfere. I think a grave question might be raised on this point; but certainly, as far as my memory goes, the point was given up at the trial. It has been assumed throughout the whole of this discussion that this point was given up, and it has not been insisted upon in the course of the argument before us. Therefore we must take it, at all events for the present purpose, that by the concurrence of the parties, it is admitted that, in the event of default being made in the men starting themselves, the referee would be entitled to interfere. We must also take it, I think, that there was undue delay and difficulty in the men starting. Upon that an application being made to the referee, he gave an order that Kelley should inform Sadler, the plaintiff, that he, the referee, insisted upon a

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start being made, and that if Sadler did not start, Kelley was, by his order, to be at liberty to row over the course. We must take it as a fact that the order was not properly communicated to Sadler, and inasmuch as the order implied that Sadler should have an opportunity of a fair start with his opponent, that that opportunity was not afforded to Sadler. In other words, we must take it as an established fact that the order given by the referee never was carried into effect. We must therefore assume that, if these facts had been present to the mind of the referee, he would have decided otherwise than he did decide. If the facts had been present to his mind, he never could have come to the conclusion that a start had been made and a race rowed so as to have entitled Kelley to row over the course and have the stakes. The merits of the case are clearly with the verdict of the jury. The stakes ought never to have been given up to Kelley, because no race was ever run. If Kelley had placed his boat alongside that of Sadler, communicated intelligibly the order of the referee, and then Sadler had refused to row the race, then certainly the case would be different in point of law and justice. But, in point of law, it is said that the decision of the referee is final and conclusive; and, whatever may be the merits of the case, the decision must be taken to be final, and the plaintiff cannot recover. That proposition is maintained on the authority of two sets of cases. In the first place, it is said that this is essentially an arbitration, and the decision of the referee is in substance an award, and you cannot dispute in an action the validity of an award by reason of misconduct or miscarriage in the arbitrator, until you have set the award aside. And another class of cases has been referred to as conclusive of this question, in which courts of law have held that, in matters of racing, where money has been staked, and where it has been agreed that stewards or umpires should be the sole judges of the result, there the Court will not interfere, certainly not to supersede such judges. I think this case is distinguishable from both classes of authorities that have been referred to on the part of the defendant. I quite agree, where parties have agreed that the result of a race, or of any other subject matter of wager shall abide the decision of a particular judge chosen by the parties, and the event, upon the decision of which has depended the issue, has taken

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place, that there they must abide by the decision of the particular individual who is constituted judge and arbitrator between them. But in all these cases, to which Mr. Garth properly called our attention, the event had come off; there had been the race or whatever was the subject matter of the wager, and then the Court properly said, you must wait, if there has been no decision, until a decision of the judge you have appointed has been taken, or, if his decision has been taken, we cannot interfere with a judicial determination by a person whom you have appointed judge. In this case the matter is very different, because the event upon which the referee was to decide has never taken place. As to the other question that the decision cannot be questioned until the award is set aside, I think this case again is distinguishable from the cases cited in this point. Here by the terms of the contract the referee had no power to start the parties, they were to start themselves. And let it be granted that, upon their failing to start themselves, he had authority to decide how and in what way the start should be made, and, as an alternative, to decide that, if no start took place between the men themselves, one of them shall be at liberty to go over the course. But then, assuming this, the order which the referee makes is plainly a conditional one. It is that the start shall be made at once, and if the start be not made, that one of the parties shall be at liberty to row over the course. His jurisdiction to make such an order may have come into operation in the given state of circumstances which presented themselves; but assuming he did make that order, and it was competent to him to make it, the order was never complied with; there never was a start such as he had prescribed; there never was a race such as he had contemplated and was implied in the order that he gave; there was no start; there was no race. But then it is said the referee has decided that there was a start, and that there was a race: for that is implied in the award of the stakes. Now, the distinction which I take between this case and the cases upon which Mr. Garth relied, is this. In those cases there had either been a decision of the arbitrator upon the point, which enabled him to make the award in favour of the party in whose favour he did make it. Either such a decision was shewn in point of fact, or there was nothing to shew the contrary. Now here the referee has power to award to whom

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the stakes shall be given, but that presupposes that there shall have been a race, and the race presupposes a start. Primâ facie it would be implied when the referee awarded the stakes, that there had been a start, and that there had been a race; but although that would be primâ facie implied, we have before us evidence negativing the facts that there was a start and that there was a race, and having those facts negatived in evidence before us, and those facts being absolutely necessary to give the referee jurisdiction to award the stakes, it seems to me that that which is the foundation of his authority to award the stakes fails by his own evidence, and by the other proofs in the case and the finding of the jury. I think therefore that the cases cited do not apply, and that we have here the case of stakes awarded without jurisdiction, there having been none of the conditions precedent upon which the jurisdiction would attach. I think therefore that the verdict ought to stand, and the rule must be discharged.

HANNEN, J. I am of the same opinion. I admit that I have had considerable difficulty in coming to a conclusion upon the case; but I have now arrived at the opinion that the plaintiff is entitled to maintain his verdict. I think that Mr. Garth was well justified in his argument that we are not entitled in an action like this to overrule any decision of the arbitrator as to anything within his jurisdiction; and that it must be taken, as to everything which was within his jurisdiction, that his decision is absolutely final and incapable of being reviewed by a jury or by this Court. But the question is, what has the referee decided? Having ascertained what he has decided, we must consider whether he was acting within his jurisdiction. Now, in terms, he only decided immediately after the race took place, that Kelley was entitled to the stakes. That may be a decision involving all the steps necessary to raise a valid title in Kelley to the stakes, or, on the other hand, may be merely an order by the referee without any authority that the money should be paid over.

The question may be illustrated in this manner. Suppose that no race or pretence of a race having taken place, the referee had said, "I award that Kelley is entitled to the stakes," he would not on that account, have been entitled to them, because, in fact, it

would not have been an award made with reference to such a race as the parties contemplated, and with reference to which only they consented that the referee should have authority. Well, in this particular case, the referee hearing a report that Sadler would not start, sent an order through his competitor Kelley, that if he did not start Kelley was to row the race without him. Now, I will assume for the present purpose that the referee had power to make such an order. That seems to have been conceded, and I should think, from the nature of the race, that it was a sort of authority that such persons would desire to give to a referee. It would be in his power to say that the men should start at a particular time, if up to that time they had not been able to start themselves. Accordingly, I am inclined to think, and I assume for the purposes of the present judgment, that if a question had subsequently been raised as to whether or not Sadler had in fact refused to start, that it would have been within the jurisdiction of the referee to say whether or not he had refused. But, in fact, no such question arose. The referee, having sent this message to Sadler by Kelley, that if Sadler would not start Kelley was to start without him, proceeded upon what he considered to be his business to look after the progress of the race, and when Kelley came in he assumed that that had been done which he himself had prescribed as the condition upon which the race was to depend. It was precisely the same as if Kelley, instead of going back to where Sadler was and saying something, or appearing to say something to him, had simply turned his boat round out of sight of the referee, and so rowed in to the winning post. If that had taken place, and we can suppose that the referee could have remained uninformed of that, seeing Kelley come in he would have assumed that what he had directed to be done had been done; whereas, in fact, nothing of the kind had been done, and in fact no race within the meaning of the parties would ever have taken place. That which I have illustrated by a strong instance is only the equivalent to that which really has taken place. The referee sends Kelley back to give the order; Kelley, in fact, as found by the jury, communicated nothing whatever to Sadler. It follows from that, that Sadler never did refuse to start; and the condition upon which the referee had said the race was to be run never took place. Kelley never ought to

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have started, and starting as he did he did not in any way perform that race with reference to which the power of the referee had been given.

I am therefore of opinion that that state of things had never arisen with reference to which the referee had any power to determine the question who was entitled to the stakes. He never had present to his mind, nor was there at that time any dispute raised as to whether or not Sadler had been guilty of refusing to row the race; but the referee assumed that a race had taken place when, in point of fact, no race at all had taken place. Upon these grounds I think that our judgment should be for the plaintiff.

HAYES J. I am entirely of the same opinion, and for the reasons already given. The case seems to me in truth to be the same in substance as if, there being a race to be run between two race horses, a start took place without the consent of the starter; one started without giving notice to the other, and in fraud of the other, never having given the other any opportunity of starting, and consequently contrary to the real directions that the referee had given on the subject. There has, therefore, been no race. Upon the supposition that everything has been fair and straightforward, and that all the rules have been complied with, the referee has decided "You may take the stakes." But in point of fact the referee is to judge of the race, and to judge of the race an opportunity must be given to him of doing so by the men, and where the men had actually rowed. If the plaintiff had the opportunity of a fair start and refused and omitted to take that start, that would have been his fault; but neither of those circumstances have taken place here, and in truth there has been no race at all, and that point goes to the very root of the matter. I hold that the referee therefore had not authority to decide when there was no race at all, and for those reasons I think the plaintiff is entitled to recover his deposit, inasmuch as the race that was contemplated has not been rowed.

Rule discharged.

Attorney for plaintiff: *Frank Richardson.*
Attorney for defendant: *C. Mossop.*

PHILLIPS *v.* EYRE.

1869
Jan. 29.

Action—Lex fori—Lex loci—Comitas gentium extended to Colonies—Right of Action in England for acts in Foreign Country—Effect in England of Act of Indemnity by Colony—Governor of Colony can give a Legal Assent to a Legislative Enactment in his own favour.

In bar to an action for assault and false imprisonment of the plaintiff in the island of Jamaica, the defendant pleaded that since the grievances complained of, an Act of Indemnity had been passed by the legislature of Jamaica and assented to by the Crown; which enacted that all personal actions, suits, indictments, prosecutions, and proceedings, present or future, against any persons for acts done in good faith, after the proclamation of martial law, in the suppression of a rebellion which had broken out in the island, should be discharged and made void, and that any person by whom such acts had been done should be acquitted and indemnified against the Queen and all other persons; and that the defendant, the governor of the island, and all acting under his authority, were indemnified in respect of all acts done in order to put an end to the rebellion, and such acts were made and declared to be lawful. That the grievances complained of were acts done within the indemnity of the Act.

The plaintiff replied, that the defendant, at the time of the passing of the Act, was the governor of Jamaica and was a necessary party to the passing of the Act, and the Act could not have become the law of Jamaica without defendant's assent as governor. On demurrers to the plea and replication:—

Held, that local legislatures having been established in the English colonies, with plenary powers of legislation, the comity which obtains among nations should be extended to them by the tribunals of this country, when the law of the colony conflicts with the law of England, in respect of acts done within the jurisdiction of the colony. That where the right of action, in respect of an act otherwise wrongful, is taken away, before an action has been brought in this country, by a law binding where such act was done, no action can be maintained in this country. That the plea was therefore good.

Held also, that the governor of a colony could legally give his official assent to a legislative measure in which he is personally interested; and that the replication was therefore bad.

THE writ in this action was issued on the 7th of November, 1867.

The first count was for an assault and false imprisonment of the plaintiff at his house in the island of Jamaica, and causing him to be conveyed to the court-house there on the 24th of October, 1865.

Second count, for an assault and false imprisonment at the said court-house on the 25th of October, 1865.

Third count, for an assault and false imprisonment, and for

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forcibly conveying the plaintiff handcuffed from his house to a place called Uppuck Camp in the said island.

Fourth count, for an assault and imprisonment, and for forcibly conveying the plaintiff from Uppuck Camp to a certain place called the Ordnance Wharf.

Fifth count, for an assault and imprisonment, and for forcibly putting the plaintiff on board a ship called the *Wolverine*, and conveying him to a place called Morant Bay.

Sixth count, for an assault by beating and flogging the plaintiff.

Seventh count, for seizing and taking the goods and chattels of the plaintiff, and carrying them away and disposing of them to the defendant's use.

Pleas: 1. Not guilty.

2. That the defendant was captain-general and governor-in-chief of the island of Jamaica and the territories depending thereon, the same then and still being a colony or dependency of the British Crown, by virtue of a commission from her Majesty the now Queen of the United Kingdom of Great Britain and Ireland, under the Great Seal of the United Kingdom, and that divers persons in the island of Jamaica had conspired by force to overthrow the constitution and government in the island by law established, and in pursuance of the conspiracy great numbers of the inhabitants of the island had broken out into open rebellion and had committed many burglaries, robberies, arsons, murders, and other felonies, and the civil power of the island had been overpowered by the rebels, and the defendant with the assistance and co-operation of the military and naval forces of the Queen and of her faithful subjects in the island, had by force of arms arrested the progress of the rebellion, and afterwards and after the rebellion had been so arrested a certain act of parliament was made and passed by the governor, legislative council, and house of assembly of the island of Jamaica, in the 29th year of the now Queen (1865—1866) for the purpose of indemnifying the defendant and all other officers and persons concerned in arresting the rebellion in the island by such force of arms as aforesaid, which act is in the words and figures following:—

"Whereas being seduced by the insidious counsel of wickedly designing persons, many of the Queen's subjects in this island conspired by force to overthrow

the constitution and government here established by law, and in furtherance of such their purpose, did with force and in confederated multitude commit on the 11th day of October, in this present year of our Lord 1865, and on divers other days then following, in the parish of St. Thomas in the East, many burglaries, robberies, arsons, murders, and other felonies, with treasonous purpose in renunciation of their natural allegiance, and to the intent of the general massacre of all loyal and well disposed subjects of the Queen here dwelling. And whereas upon being informed of such the aforesaid atrocities, his Excellency Edward John Eyre, Esq., the governor of this island, with the advice of a council of war and in order to prevent the extension of the rebellious outbreak, did proclaim that martial law should obtain and prevail throughout the county of Surrey, with the exception only of the city and parish of Kingston. And whereas under God's providence the military and naval forces of the Queen, with the loyal co-operation of others her Majesty's faithful subjects in this island, have arrested the spread of this rebellion and saved the lives of law-abiding citizens from imminent general sacrifice. And whereas military, naval, or civil authorities necessarily employed in the prompt suppression of the atrocities aforesaid, may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion. And whereas it is expedient that all persons, whosoever in good faith and of loyal resolve have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for such their acts of loyalty. Be it therefore, and it hereby is enacted by the governor, legislative council, and assembly of this island, first, that all personal actions, and suits, indictments, informations, attachments, prosecutions, and proceedings, present or future, whatsoever against such authorities or officers, civil, military, or naval, or other persons acting as last aforesaid, for or by reason of any matter or thing commanded, ordered, directed, or done, since the promulgation and publication of the proclamation of martial law aforesaid, whether done in any district in which martial law was proclaimed or in any district in which martial law was not proclaimed, in furtherance of martial law, that is to say, on, from, and after the 13th day of October last past, and during the continuance of such martial law, in order to suppress the insurrection and rebellion, and for the preservation of the public peace throughout the island shall be discharged and made void, and that every person by whom such act, matter, or thing shall have been advised, commanded, ordered, directed, or done for the purposes aforesaid, on, from, and since the 13th day of October, and during the existence of such martial law, shall be freed, acquitted, discharged, and indemnified, as well against the Queen's most gracious Majesty, her heirs and successors, as against all and every person and persons whomsoever."

"And it is hereby also enacted, that his Excellency Edward John Eyre, Esq., captain-general and governor-in-chief, and all officers and other persons who have acted under his authority, or have acted bonâ fide for the purposes and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed, or in any district in which such martial law was not proclaimed, are hereby indemnified in respect of all acts, matters, and things done in order to put an end to the rebellion, and such acts so done are hereby made and declared to be lawful and are confirmed."

"In order to prevent any doubt which might arise whether any act alleged to have been done under the authority of the governor, or to have been done bonâ

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fide in order to suppress and put an end to the rebellion was so done, it shall be lawful for the governor for the time being to declare such acts to have been done under such authority, or bonâ fide for the purposes aforesaid, and such declaration by any writing under the hand of the governor for the time being, shall in all cases be conclusive evidence that such acts were so done respectively."

That by the laws and constitution of the island, the governor, legislative council, and assembly of the island had power and authority to make and pass the Act, subject to the assent of the Queen thereto; and that afterwards the Act duly received the assent of her Majesty, and all conditions in that behalf to be performed having been performed, and all things necessary to be done having been done, and all times necessary to elapse having elapsed, the act became, and was, and is part of the law of the island of Jamaica. That the person in the Act called his Excellency Edward John Eyre, Esq., was and is the defendant, and that the alleged grievances in the declaration mentioned were committed in the island of Jamaica after the 13th of October, 1865, and during the continuance of the rebellion, and before the passing of the Act, and were measures used in the suppression of the rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to the rebellion, and were matters and things bonâ fide done in order to put an end to the rebellion, and are included in the indemnity given by the Act.

Replications: 1. Issue joined on the pleas.

2. Demurrer to the second plea and joinder.

3. To the second plea, that the plaintiff sues not only for the trespasses admitted, but also for that the defendant committed such trespasses as are complained of and not included in the Act on other occasions, for longer periods of time, and in other places than are attempted to be justified or excused, and in excess of the alleged right or excuse.

4. As to the second plea, so far as it relates to divers of the trespasses committed on the high seas, and mentioned in the fifth count, the plaintiff says that the trespasses were committed beyond the territorial limits within which the Jamaica legislature had at the times or at the time when the act was made and passed jurisdiction or authority.

5. To the defendant's second plea, that the defendant, at the time of the making and passing of the Act in the plea set forth,

was the governor of the island of Jamaica and the territories thereon depending, and was then present in the island, and was then acting in such capacity of governor of the island, and is the governor referred to in the Act in the words "Be it therefore, and it is hereby enacted, by the governor, legislative council, and assembly of this island;" and was by the law and constitution of Jamaica himself a necessary party to the making and passing of the Act, and the Act, so far as it became the law of Jamaica was by virtue of his consent as such governor, acting with the council and assembly, and could not have become the law of Jamaica, without the consent of the defendant as such governor.

Demurrer to the fifth replication and joinder.

Nov. 17, 1868. *Quain, Q.C.* (*J. H. Payne* with him), for the plaintiff. The second plea is not a plea of justification, justifying the tort under the law of Jamaica; but it is a plea of discharge setting up a special act of ex post facto legislation, conferring indemnity on certain persons, and amongst them on the defendant. The lex loci commissi delicti does not apply to this case, because it is an action brought in England against the governor of a colony who could not be sued there for acts done in the colony. Lord Mansfield, in his judgment in *Mostyn* v. *Fabrigas* (1), says: "In every plea to the jurisdiction you must state another jurisdiction . . . .; and in every case to repel the jurisdiction of the king's court you must shew a more proper and more sufficient jurisdiction; for if there is no other mode of trial, that alone will give the king's courts a jurisdiction."

[LUSH, J. The action does not lie in the colony, because it is a personal immunity of the governor while governor that he should not be sued.

COCKBURN, C.J. No one doubts the law as laid down by Lord Mansfield in *Mostyn* v. *Fabrigas* (1) is correct; but the defendant contends that the Act of Indemnity bars the right of the plaintiff to sue in England.]

Assuming, then, there was a wrong done for which the defendant would be amenable here, the plaintiff had a cause of action in this country the moment that the tort was committed, and that cause of

(1) Cowp. at p. 172; 1 Sm. L. C. at p. 637, 6th ed.

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action cannot be divested by the act of the legislature of Jamaica. There is no difference between a prosecution under the act generally known as The Governor's Act (11 & 12 Wm. 3, c. 12) (1), and a civil action. If there was an indictment in this court under that act, the defendant could not set up in answer a law made ex post facto. The statute 11 & 12 Wm. 3, c. 12, made governors of colonies punishable for crimes and offences committed out of the realm. At the time of the passing of that act it was thought that in general crimes committed in the colonies could not be punished in England; but it is clear, that before the reign of Henry VIII. such offences could be heard and determined before the constable and marshal: 3 Ins. 48; but that court having in that reign practically ceased to exist (2), there was no criminal tribunal until 11 & 12 Wm. 3, c. 12, to try such offences.

[COCKBURN, C.J. It is very doubtful whether the court of the constable and marshal had jurisdiction, except for acts done in war; but it is unnecessary to discuss that question.]

A court of oyer and terminer had no jurisdiction, because the offence was not committed within any county from which a jury could come. The object of 11 & 12 Wm. 3, c. 12, was not to

(1) 11 & 12 Wm. 3, c. 12, enacts:— "Whereas a due punishment is not provided for several crimes and offences committed out of this his Majesty's realm of England, whereof divers governors, lieutenant governors, deputy governors, or commanders-in-chief of plantations and colonies within his Majesty's dominions beyond the seas, have taken advantage, and have not been deterred from oppressing his Majesty's subjects within their respective governments and commands, nor from committing several other great crimes and offences, not deeming themselves punishable for the same here, nor accountable for such their crimes and offences to any person within their respective governments and commands; for remedy thereof be it enacted, ... that if any governor, lieutenant-governor, deputy-governor, or commander-in-chief of any plantation or colony within his Majesty's dominions beyond the seas shall, after the 1st day of August, 1700, be guilty of oppressing any of his Majesty's subjects beyond the seas within their respective governments or commands, or shall be guilty of any other crimes or offences, contrary to the laws of this realm or in force within their respective governments or commands, such oppressions, crimes, and offences shall be inquired of, heard, and determined in his Majesty's Court of King's Bench here in England, or before such commissioners, and in such county of this realm as shall be assigned by his Majesty's commission, and by good and lawful men of the same county; and that such punishments shall be inflicted on such offenders as are usually inflicted for offences of like nature committed here in England."

(2) See 4 Bl. Com. 268.

make a new crime, but to make acts always deemed criminal triable before a court of common law; and the intention was merely to make these offences, for which a civil transitory action could previously be maintained, punishable by indictment in England. An action and an indictment, therefore, stand upon the same footing. In the criminal proceedings taken against the defendant, Blackburn, J., in his charge to the grand jury (1), expressed an opinion, that after a bill had been found in England, it would not have been competent to the Jamaica legislature to pass any Act of Indemnity equivalent to a pardon. The reasons given by the learned judge why the Jamaica legislature could not stay proceedings on an indictment after it was found are cogent to shew that they could not prevent its being found; and as an indictment and an action stand upon the same footing, the Jamaica legislature cannot divest the cause of action which has once vested.

[COCKBURN, C.J. If a British subject sustains a wrong in a colony, alternative remedies are open to him; he can sue either in the colony or in England. The short question is, can the right to sue in England be taken away by the colonial legislature?]

Suppose that the legislature of Jamaica had enacted in express terms that the defendant should not be sued in England, that could not be pleaded to an action in this country.

THE COURT then called upon

Mellish, Q.C. (*Poland* with him), for the defendant. By the law of England the legislature of a colony is supreme within the boundary of the colony. The courts in this country are bound to recognize the laws which the colonial legislature make as part of the English law. The Crown may refuse its consent to a colonial Act; the imperial parliament may interfere; and the laws which the colonial legislature make must not be "repugnant" to the law of England, as that word is explained in 28 & 29 Vict. c. 63 (2); but, subject

(1) *The Queen* v. *Eyre*, by Finlason, p. 101.

(2) 28 & 29 Vict. c. 63, s. 2:—"Any colonial law which is or shall be in any respect repugnant to the provisions of any act of parliament extending to the colony to which such law may relate, or repugnant to any order or regulation made under authority of such act of parliament, or having in the colony the force and effect of such act, shall be read subject to such act, order, or regulation, and shall to the extent of such repugnancy, but not otherwise,

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to these qualifications, the laws passed by the colonial legislature, and made with reference to acts committed within their jurisdiction, are as binding as the laws of the imperial parliament. The courts of this country recognize them not through international courtesy, but because they must be taken to be part of the law of England. It may well be that the colonial legislature have no power to take away a remedy from a British subject, but they may discharge a cause of action which has accrued within the limits of their territory. Slavery in Jamaica was established by the law of the island, and when the negro Somerset was brought to England it was held that he was a free man: *Somerset* v. *Stewart* (1); but no one ever said that he could bring an action for the injury he had sustained in the colony. It is necessary to distinguish between a cause of action and the remedy; the former is regulated by the lex loci, and the latter by the lex fori, so long as the wrongful character of the act exists. There is no analogy between a civil action for a wrong done abroad and an indictment for an offence committed abroad.

Acts of Indemnity are no novelty in the history of this country. From very early times, after almost every rebellion, Acts of Indemnity have been passed by the imperial legislature, and they must from their nature operate retrospectively, and take away vested causes of action. The first Act of Indemnity was passed so early as 1 Edw. 3, st. 1, c. 1. (2) This was followed by 5 Rich. 2, st. 1, c. 5. There is also the 7 Henry 4, c. 18, and 1 Henry 7, c. 6. In the reign of William and Mary three such acts were passed: 1 W. & M. sess. 2, c. 8; 2 W. & M. sess. 2, c. 13; and 4 & 5 W. & M. c. 19; and there is the 19 Geo. 2, c. 20. So the Irish parliament have from time to time passed Acts of Indemnity for acts done in Ireland. The principal of these are 3 Geo. 3, c. 19; 35 Geo. 3, c. 13; 36 Geo. 3, c. 6; 37 Geo. 3, c. 39; 38 Geo. 3, c. 19; 38 Geo. 3, c. 74; 39 Geo. 3, c. 3. Would not these statutes have afforded protection

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be and remain absolutely void and inoperative."

s. 3:—"No colonial law shall be, or be deemed to have been, void or inoperative on the ground of repugnancy to the law of England unless the same shall be repugnant to the provisions of some such act of parliament, order, or regulation, as aforesaid."

(1) Lofft, 1; 20 How. St. Tr. 1.

(2) There were earlier Acts of Indemnity in 7 Ed. 2 and 15 Ed. 2.

against proceedings in England for acts done in repressing rebellions in Ireland? There are also numerous Acts of Indemnity passed in the colonies. In New Zealand, 29 Vict. No. 1; 30 Vict. No. 11; 31 Vict. No. 39. A similar Act was passed in St. Vincent in 1862 (No. 184). In Ceylon an Act was passed in 1848 which indemnified the governor in express terms; it is entitled "An Ordinance enacted by the Governor of Ceylon with the advice and consent of the Legislative Council thereof, No. 11, to Indemnify the Governor and all persons acting under his authority for certain acts done during the existence of martial law in certain parts of this island." There are many other instances of such Acts having been passed by the colonial legislatures of the Cape of Good Hope and Lower Canada. (1) Acts of Indemnity are thus well known to the law; and the practice has been that when a rebellion takes place in England the English legislature passes the Act of Indemnity; when the rebellion is in Ireland, or the colonies, the respective local legislatures pass the Act. The extent to which an Indemnity Act is valid must depend on the legislative powers given to the colonial legislature, under their charter and the act of parliament constituting them a legislative assembly. The remarks of Parke, B., in *Beaumont* v. *Barrett* (2), shew that the powers of the legislature of Jamaica are most extensive. When large legislative powers have been given to a colony it never could be intended that a statute must be passed by the imperial legislature in order to give a complete indemnity for acts done in the colony. There is no authority in point to guide the decision of this case. In *Scott* v. *Seymour* (3) one British subject brought an action against another for an assault committed at Naples, and it was held that the plaintiff was not barred from his action because by the law of Naples no proceedings to recover damages could be maintained by

(1) Cape of Good Hope, No. 10, 1836:—"Ordinance to indemnify the governor of the colony, and all persons acting under his authority, against certain acts done during the existence of martial law in certain parts of the colony.

No. 4, 1847:—"Ordinance . . . to indemnify all persons in regard to certain acts done during the recent existence of martial law."

See also Ordinance No. 8 of 1853.

Lower Canada. Ordinance of 1838, c. 14; 2 Vict. c. 66; 3 & 4 Vict. c. 10.

(2) 1 Moo. P. C. 59, 75. See *Doyle* v. *Falconer*, Law Rep. 1 P. C. 328.

(3) 1 H. & C. 219, 234–5; 32 L. J. (Ex.) 61.

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the plaintiff until after the defendant had been condemned by a criminal tribunal, nor because damages could be recovered only in one particular form of proceeding. Wightman, J., was of opinion that the plaintiff was entitled to damages in England even though by the law of Naples no damages could be recovered there, but Williams and Crompton, JJ., seemed to have been of a contrary opinion.

[COCKBURN, C.J. Where a British subject is indicted under 24 & 25 Vict. c. 100, s. 9, for murder, it is unnecessary to prove whether the crime is murder by the law of the country where the homicide was committed.]

The converse case arose in *Re Anderson* (1), but it became unnecessary to decide the point.

Quain, Q.C., in reply. A cause of action having vested in the plaintiff in England, he cannot be deprived of it by any statute passed by the Jamaica legislature; and the Act of Indemnity being contrary to the principles of justice, it will not be allowed or enforced by the comity of nations in any court but in the court of the country where it was enacted. The legislature of Jamaica had no power to pass this Act, as it is "repugnant" to 11 & 12 Wm. 3, c. 12, as that word is explained by 28 & 29 Vict. c. 63.

[COCKBURN, C.J. Even if the Act of Indemnity for this reason be void as to criminal proceedings, it might nevertheless protect the defendant in civil suits.]

But 42 Geo. 3, c. 85, s. 6 (2), applies to civil actions, and the Act of Indemnity is repugnant to that section.

(1) 3 E. & E. 487; 30 L. J. (Q.B.) 129.

(2) 42 Geo. 3, c. 85, s. 6, after reciting that it is expedient to extend the provisions of 21 Jac. 1, c. 12, enacts: "That from after the passing of this act, the said recited act and all the provisions therein contained, shall extend, and be deemed, taken, and construed to extend to all persons having, holding, or exercising, or being employed in, or who may hereafter have, hold, or exercise, or be employed in any public employment, or any office, station, or capacity either civil or military, either in or out of this kingdom; and who under and by virtue, or in pursuance of an act or acts of parliament, law or laws, or lawful authority within this kingdom, or any act or acts, statute or statutes, ordinance or ordinances, or law or laws, or lawful authority in any plantation, island, colony, or foreign possession of his Majesty, now have, or may hereafter have, by virtue of any such public employment, or such office, station, or capacity, power, or authority to commit persons to safe custody; and all such persons having such power or autho-

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[COCKBURN, C.J. That section only enacts that where a right of action exists the venue may be laid at Westminster.]

Where a tort is committed abroad, the lex loci commissi delicti will not be enforced in an English court if it be inconsistent or contrary to the English law: *The Halley.* (1) The reason why contracts made in foreign countries are governed by the lex loci is because the contracting parties are presumed tacitly to incorporate the law of the country where the contract is entered into. This reason has no application to a tort. The law relating to the discharge of a debt by bankruptcy has no application either, because when a debt is contracted the creditor must be taken to contemplate the possibility of its extinction by bankruptcy: Westlake on Private International Law, p. 237. If a country, in which a contract has been made, should pass a law authorizing a discharge from all contracts made with foreigners, and should at the same time exclude the latter from all participation with domestic creditors in the assets, such an Act would be held not to be a discharge in the countries to which the foreigners belonged: Story's Conflict of Laws, s. 337; 4 Phillimore's International Law, p. 563. So an Act of Indemnity, which professes by ex post facto legislation to make a wrongful act right, will not be recognized in any other country but the country wherein it is passed.

Secondly. The replication shews that the defendant is legislating in his own behalf; he cannot, by his own act, free himself from his liability.

[COCKBURN, C.J. The defendant filled two capacities, public and private, and it was in the former he assented to the Act. There

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rity as aforesaid shall have and be entitled to all the privileges, benefits, and advantages given by the provisions of the said act as fully and effectually to all intents and purposes, as if they had been specially named therein: Provided always, that where any action, bill, plaint, or suit upon the case, trespass and battery, or false imprisonment, shall be brought against any such person as is in this act described as aforesaid in this kingdom, for or upon any act, matter, or thing, done out of this kingdom, it shall be lawful for the plaintiff bringing the same to lay such act, matter, or thing to have been done in Westminster, or in any county where the person against whom any such action, bill, plaint, or suit, shall be brought shall then reside; anything in this act to the contrary thereof notwithstanding."

(1) Law Rep. 2 P. C. 193.

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is no authority for saying that a man who has legislative power may not legislate on his own behalf.]

Cur. adv. vult.

Jan. 29. The judgment of the Court (Cockburn, C.J., Lush and Hayes JJ.) was delivered by

COCKBURN, C.J. This is an action for assault and false imprisonment, and other personal injuries of a very grievous character, committed by the defendant on the plaintiff in the island of Jamaica. The plea on which the present question turns, admitting, as for the present purpose it must do, the fact of such acts having been done, and of their having been wrongful when done, sets forth an Act of Indemnity since passed by the legislature of Jamaica, and afterwards assented to by the Crown, of which the defendant claims the protection in bar of this action.

The Act in question being set forth at length in the plea, it is only necessary for the present purpose to state the substance and effect of it. After reciting that a rebellion had broken out in the island, that the governor, with the advice of a council of war, had proclaimed martial law throughout the county of Surrey, with the exception only of the city and parish of Kingston, and that the military and naval forces, with others, had arrested the spread of the rebellion; and after further reciting that the military, naval, and civil authorities necessarily employed may, according to the law of ordinary peace, be responsible in person or purse for acts done in good faith for the purpose of restoring public peace and quelling the rebellion, and that it is expedient that all persons, who in good faith and of loyal resolve have acted for the crushing of this rebellious outbreak, should be indemnified and kept harmless for their acts of loyalty, the statute goes on in substance to enact, first, that all proceedings, civil or criminal, present or future, against such authorities or officers, civil, military, or naval, or other persons, for anything commanded or done since the publication of martial law, that is from the 13th of October, 1865, and during its continuance, whether within any district in which martial law was proclaimed or without, in furtherance of martial law, in order to suppress the insurrection and rebellion, and for the preservation of the public peace throughout the island, shall be discharged and

made void, and that every person by whom any such act, matter, or thing, shall have been advised, ordered, directed, or done for the purposes aforesaid, during the existence of such martial law, shall be freed and indemnified both against the Crown and against all other persons.

The second provision of the Act has special reference to the present defendant. It is in these terms:—"That his Excellency Edward John Eyre, Esquire, Captain General and Governor in Chief, and all officers and other persons who have acted under his authority, or have acted bonâ fide for the purposes and during the time aforesaid, whether such acts were done in any district in which martial law was proclaimed or in any district in which martial law was not proclaimed, are hereby indemnified in respect of all acts, matters, and things done in order to put an end to the said rebellion, and all such acts so done are hereby made and declared to be lawful, and are confirmed."

To this enactment is appended the following remarkable provision:—"In order to prevent any doubt which might arise whether any act alleged to have been done under the authority of the governor, or to have been bonâ fide in order to suppress and put an end to the said rebellion was so done, it shall be lawful for the governor for the time being to declare such acts to have been done under such authority, or bonâ fide for the purposes aforesaid, and such declaration by any writing under the hand of the governor for the time being shall in all cases be conclusive evidence that such acts were so done respectively."

After thus setting forth the Act of Indemnity, and also averring that such Act had duly received the royal assent, and had become part of the law of Jamaica, the plea concludes by averring that the alleged grievances in the declaration mentioned were committed in the said island of Jamaica after the said 13th day of October, 1865, and during the continuance of the rebellion and before the passing of the Act, and were measures used in the suppression of the said rebellion, and were reasonably and in good faith considered by the defendant to be proper for the purpose of putting an end to the said rebellion, and are included in the indemnity given by the said Act.

To this plea there was a demurrer. There was also a new assign-

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ment, and a further replication: First, that the trespasses complained of were committed beyond the territories within which the Jamaica legislature had jurisdiction and authority. Secondly, that at the time of the passing of the Act of Indemnity the defendant was Governor of Jamaica, that his assent to the Act was necessary, that his assent had been given, and that by virtue of it the Act had become the law of Jamaica. To the latter replication the defendant demurred.

We have first to consider the validity of the defendant's plea. The plea admits, as it necessarily must do, that the acts complained of were done, and when done were wrongful. On the other hand, it cannot be disputed that the Jamaica legislature, having full legislative authority within the limits of the colony, subject only to the assent of the Crown, had full power to pass the statute in question so far as to take away the right of action before the local tribunals of the island. But it is contended on the part of the plaintiff that a right of action being given before the courts here in respect of personal wrongs committed in a colony, this right cannot be taken away by an Act having no legislative effect beyond the limits of the local authority.

The argument for the plaintiff may be thus put. Upon every wrongful act inflicting a personal injury a right of action immediately accrues to the party wronged, and becomes a vested right. In the case of a wrong suffered in a colony, a twofold, or, at all events, an alternative right of action arises, namely, a right not only to sue for redress in the courts of the colony, if redress can be there obtained, but also to sue in the courts of this country, if the wrong-doer can be found within the jurisdiction of the latter. And though the local legislature may take away the right of action within the limits of its authority, it cannot take away the right of action in this country, inasmuch as no authority, save that of the Imperial Legislature, can take away the jurisdiction of the Queen's courts here, or deprive the subject of his right to redress afforded, not by virtue of the local law, but by virtue of the law of England, which gives a right of action in respect of personal injuries suffered in other countries.

We were much struck with this view, and the question being one of great importance, we took time to consider our judgment;

but on the fullest consideration we can give to the case, we have come to the conclusion that the foregoing reasoning is unsound, and that on this demurrer the defendant is entitled to our judgment.

It may be useful to consider what would have been the effect if, instead of legislating ex post facto, the Legislature of Jamaica, in anticipation of future events, had passed a statute authorizing the acts which have given rise to this action. We cannot doubt that in such a case no right of action would arise here. It appears to us clear that where by the law of another country an act complained of is lawful, such act, though it would have been wrongful by our law if committed here, cannot be made the ground of an action in an English court. The rule, which obtains in respect of property and civil contracts,—namely, that an act, unless intended to take effect elsewhere, shall as regards its effect and incidents, if a conflict of law arises between the lex loci and the lex fori, be governed by the former,—appears to us to be applicable to the case of an act occasioning personal injury. To hold the contrary would be attended with the most inconvenient and startling consequences, and would be altogether contrary to that comity of nations in matters of law to which effect should, if possible, be given. An act might not only be lawful, but might even be enjoined by the law of another country, which would be wrongful, and give a right of action by our law, and it certainly would be in the highest degree unjust that an individual who has intended to obey the law binding upon him should be held liable in damages in another country where a different law may prevail. Thus, an arrest and imprisonment might be perfectly justified by the law of a foreign country under circumstances in which it would be actionable here. It would be impossible to hold that in such a case an action could be maintained in an English court.

The same reasoning will apply where an act, though not enjoined, is yet authorized and rendered lawful by the law of the country where it is done. There will have been no intention to inflict a wrong in such a case, nor according to the law of the particular country will any right have been infringed.

It may be that where an act which, though not authorized by the lex loci, yet gives no right of action—as where that act is

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punishable by criminable proceedings, but gives no right to damages, but such act, by the law of this country, would give a right to damages—as in such a case no conflict of law would arise, an action might be maintained in an English court. The latter question arose in the case of *Scott* v. *Lord Seymour* (1), but was not decided. Wightman, J., indeed, when the case was before the Court of Exchequer Chamber, expressed an opinion that, though no damages might be recoverable in the foreign country where the cause of action arose, damages might be recoverable in an English court. But the other judges declined to rest their decision in favour of the plaintiff on this view, but proceeded on the narrower ground that the plea failed to shew that by the law of Naples damages might not be recoverable, as incidental to the criminal proceedings alleged by the plea to be then pending in the Neapolitan court. The case of *Scott* v. *Lord Seymour* (1), therefore, leaves it doubtful whether damages can be recovered in an action here when damages would not be recoverable by the lex loci. It would obviously be going much further to hold that an action would lie here in respect of an act warranted by the lex loci. The case of *Reg.* v. *Lesley* (2), is more directly to the purpose. In that case the defendant was convicted on a charge of assault and false imprisonment, the facts being that the defendant, the master of an English vessel lying at Valparaiso, had engaged with the Chilian Government to bring to this country certain prisoners condemned to be banished to England, and in the course of carrying out this employment had committed the assault and imprisonment complained of. On a case reserved, the Court of Criminal Appeal held that while the conviction might be supported, as to so much of the alleged matter of complaint as had occurred when the ship had left the Chilian waters, and might therefore be considered as English territory, subject to English law, yet it could not be upheld in respect of what had been done within those waters, inasmuch as the defendant was then acting under the authority of the Chilian Government, and it must be presumed that the latter had exercised its authority according to law, and that what took place within the limit of the Chilian territory was conse-

(1) 1 H. & C. 219, 234–5; 32 L. J. (Ex.) 61. (2) Bell C. C. 220; 29 L. J. (M.C.) 97.

quently lawful. In delivering judgment, Erle, C.J., says (1):— "Can the conviction be sustained for that which was done within the Chilian waters. We answer 'No.' We assume that in Chili the act of the government towards its subjects was lawful, and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign state, yet in other respects she is subject to the laws of that state as to acts done to the subjects thereof. We assume that the government could justify all that it did within its own territory, and we think it follows that the defendant can justify all that he did there as agent for the government and under its authority. In *Dobree* v. *Napier* (2), the defendant, on behalf of the Queen of Portugal, seized the plaintiff's vessel for violating a blockade of a Portuguese port in time of war. The plaintiff brought trespass; and judgment was for the defendant, because the Queen of Portugal, in her own territory, had a right to seize the vessel and to employ whom she would to make the seizure; and therefore the defendant, though an Englishman, seizing an English vessel, could justify the act under the employment of the Queen. We think that the act of the defendant in Chili became lawful on the same principle, and therefore that there is no ground for the conviction."

This case, as well as that of *Dobree* v. *Napier* (2), referred to in the judgment, is an authority to shew that an act authorized by the law of the country in which it takes place cannot be the subject of a legal proceeding here. In this view, upon principle, as well as upon the authorities, we entirely concur.

It remains to be seen how far this principle will apply where an act, admitted to have been unlawful when done, is legalized and divested of its tortious character, and immunity is afforded to the wrong-doer in respect of it, by ex post facto legislation; and this, no doubt, is a question of greater difficulty than the one with which we have just been dealing. We are, however, of opinion that the same principle, which we have stated to be applicable to an act made lawful by former legislation, is equally applicable to an act originally wrongful, but legalized by an ex post facto law. Local legislatures having been established in our colonies, with

(1) Bell C. C. at p. 233; 29 L. J. (M.C.) at p. 101.
(2) 2 Bing. N. C. 781.

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plenary power of legislation, the same comity which obtains between nations should be extended to them by the tribunals of this country, when their law conflicts with ours in respect of acts done within their jurisdiction. The same inconvenience as we have before adverted to might otherwise arise in every instance of an Indemnity Act. An unseemly conflict of jurisdiction would occur, and the legislative authority of the local legislature, in a matter undoubtedly within their competence, would be practically defeated; and the extraordinary anomaly would arise, that an inhabitant of a colony, or it might be of a foreign country, owing allegiance to its law, and whose rights arise from and are determined by such law, would be able to enforce rights which, by the law of the country to which he more immediately belonged, have been taken away from him by a law binding upon him. It is unnecessary in the present instance to decide whether, to found an action before an English court, an act must be tortious according to the law of the particular country as well as of this; or whether the act, if unlawful by the lex loci, must give a claim to damages by the latter as well as by our law, in order to give a right to damages here. It is enough for the present purpose to say that we are of opinion that the true rule in such a case as the present is, that where the right of action, in respect of an act otherwise wrongful, is taken away, before an action has been brought in this country, by a law binding where such wrongful act was done, no action can be maintained here.

We were pressed on the argument with the objections, which readily present themselves, and the force of which it is impossible not to feel, against legislation of this nature. There can be no doubt that every so-called Indemnity Act involves a manifest violation of justice, inasmuch as it deprives those who have suffered wrongs of their vested right to the redress which the law would otherwise afford them, and gives immunity to those who have inflicted those wrongs, not at the expense of the community for whose alleged advantage the wrongful acts were done, but at the expense of individuals who, innocent possibly of all offence, have been subjected to injury and outrage often of the most aggravated character. It is equally true, as was forcibly urged on us, that such legislation may be used to cover acts of

the most tyrannical, arbitrary, and merciless character,—acts not capable of being justified or palliated even by the plea of necessity, but prompted by local passions, prejudices, or fears,—acts not done with the temper and judgment which those in authority are bound to bring to the exercise of so fearful a power, but characterized by reckless indifference to human suffering and an utter disregard of the dictates of common humanity. On the other hand, however, it must not be forgotten that against any abuse of local legislative authority in such a case protection is provided by the necessity of the assent of the Sovereign, acting under the advice of ministers, themselves responsible to parliament. We may rest assured that no such enactment would receive the royal assent unless it were confined to acts honestly done in the suppression of existing rebellion, and under the pressure of the most urgent necessity. The present indemnity is confined to acts done in order to suppress the insurrection and rebellion, and the plea contains consequently the necessary averments that the grievances complained of were committed during the continuance of the rebellion, and were used for its suppression, and were reasonably and in good faith considered by the defendant to be necessary for the purpose; and it will, therefore, be incumbent on the defendant to make good these averments in order to support his plea. As was observed by Mr. Mellish in his most able argument, Indemnity Acts have on several occasions been passed by colonial legislatures after insurrections or disturbances of natives or slaves, and have received the assent of the Crown by the advice of its ministers. In ancient periods of our history more than one such Act has been passed by the English parliament, and at the close of the last century Indemnity Acts were repeatedly passed by the parliament of Ireland during the continuance of the rebellion. Lastly, the Acts of 43 Geo. 3, c. 117, and 3 & 4 Wm. 4, c. 4, both having reference to the state of Ireland, while authorizing martial law under given conditions, gave indemnity by anticipation for acts done in exercise of it. After this frequent resort to Acts of Indemnity, and the sanction thus given to them, it is obvious that although the objections referred to may afford cogent reasons why this species of legislation shall not be unduly resorted to or encouraged, they cannot have any influence on our judgment as to how far effect should be given to

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the Indemnity Act now in question. As we have already said, plenary power to make laws having been conferred on the local legislature, subject to the assent of the Sovereign, it cannot be disputed that it was within its competence to pass the law referred to in the plea, and the only question is, whether the effect of it is to deprive the plaintiff of the right which he would otherwise have had of maintaining an action in this country. For the reasons we have given, we are of opinion that such is its effect, and consequently, that on the demurrer to the plea our judgment must be for the defendant.

It remains only to dispose of the demurrer to the plaintiff's last replication. We have no hesitation in holding such a replication to be bad. There is no ground whatever for saying that the governor of a colony cannot give his official consent to a legislative measure in which he may be individually interested. It might as well be asserted that the Sovereign of these realms could not give assent to a bill in parliament in which the Sovereign was personally concerned.

On both demurrers, therefore, our judgment must be for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *Shaen & Roscoe.*
Attorney for defendant: *J. A. Rose.*

Feb. 2.

[IN THE EXCHEQUER CHAMBER.]

BAXENDALE AND OTHERS *v.* THE GREAT EASTERN RAILWAY COMPANY.

Common Carrier—Non-declaration of Value of Goods delivered under a Special Contract—Divisibility of Contract—Carriers Act (11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 68), *ss.* 1, 6—*Railway and Canal Traffic Act* (17 *&* 18 *Vict. c.* 31), *s.* 7.

Declaration, that plaintiffs delivered on board defendants' ship certain pictures on terms agreed between them; amongst others, that defendants should carry the pictures on board their ship from Rotterdam to Harwich, with liberty to tranship them on any other steamer or railway, and deliver the same to plaintiffs at the port of London viâ Harwich, certain perils excepted, for certain freight to be paid by plaintiffs to defendants; that the defendants did not deliver the pictures to the plaintiffs, although a reasonable time had elapsed, and they had not been prevented by any of the excepted perils.

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Plea, that the pictures were goods within s. 1 of the Carriers Act, and were delivered to defendants, they being common carriers by land for hire between Harwich and London, to be by them as such carriers by land carried from Harwich to London and delivered to plaintiffs in London; that the goods were contained in one package and exceeded 10*l.* in value; and that at the time of the delivery to defendants' servants the value and nature of the goods were not declared by the persons delivering them; and that the non-delivery by defendants to plaintiffs was by reason of the same being lost out of defendants' possession while being carried from Harwich to London.

The defendants, a railway company, carried on the business of carriers between Rotterdam and London viâ Harwich, the sea journey being performed by their steamships, and the land portion between Harwich and London by their railway. A case of pictures was delivered to the defendants' agents in Rotterdam for carriage to London, and the defendants' agents signed a bill of lading: "Shipped in good order on board the A. . . . one small case pictures . . . with liberty to tranship the same on board any other steamer or railway, and are to be delivered at the port of London viâ Harwich, the act of God (and various sea perils), also railway accidents being excepted, unto P. & Co. (the plaintiffs) or assigns . . . weight, contents, and value unknown, and not answerable for leakage, breakage, &c., and for wrong delivery of goods caused by error or by insufficiency in marks or numbers." The case containing the pictures was placed on board the defendants' ship A. at Rotterdam, and unshipped at Harwich, and forwarded by the defendants' railway, and was lost in the course of transit between Harwich and London. No declaration of the value, 84*l.*, was ever made.

The Carriers Act, s. 1, enacts that no common carrier by land shall be liable for the loss of any articles of a certain description, inter alia, pictures, contained in any package delivered to be carried, when the value exceeds 10*l.*, unless at the time of the delivery at the office or to the servant of the carrier the nature and value be declared, and an increased charge paid. By s. 6 it is provided that nothing in the Act shall extend or be construed to annul or in anywise affect any special contract between a common carrier and any other parties for the conveyance of goods :—

Held, that s. 6 applies only to contracts the provisions of which are inconsistent with the exemption claimed by the carrier under s. 1.

That the fact of goods being received by a common carrier under a special contract does not deprive him of the protection of the Act, unless the terms of the contract are such as to be inconsistent with the goods having been received by him in his capacity of a common carrier.

That by the terms of the bill of lading there was a contract to carry by sea from Rotterdam, touching at Harwich, to London, or to carry by sea from Rotterdam to Harwich, and on land by railway from Harwich to London; that the contract was divisible, and the terms as to the land carriage were not inconsistent with the defendants being subject to all the liabilities of common carriers, except those expressly excepted; and the defendants were therefore also entitled to the protection given by the statute to common carriers. That the plea was therefore good, and proved.

Held, also, that the defendants could not avail themselves of the proviso in s. 7 of the Railway and Canal Traffic Act, which provides that no special contract

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between a railway company and any other party as to the forwarding of goods shall be binding upon such party unless signed by him or by the person delivering the goods.

ERROR and appeal by the plaintiffs, from the decision of the Queen's Bench, in favour of the defendants.

First count. That defendants were carriers of goods for hire from Rotterdam, by steam vessels across the sea to Harwich in this kingdom, and from Harwich to London, and defendants received, as such carriers, a case of plaintiffs, containing pictures, to be by defendants taken care of and securely carried from Rotterdam by a steam vessel across the sea to Harwich, certain perils and casualties excepted, and from Harwich to London, and there delivered to plaintiffs; that a reasonable time for carrying and delivering the same elapsed, yet defendants, although not prevented by excepted perils, &c., did not safely deliver the goods to plaintiffs, whereby the same were lost to plaintiffs.

Second count. That defendants were carriers of goods for hire from Harwich to London, and defendants received, as such carriers, a case of plaintiffs, containing pictures, to be by defendants taken care of and safely carried from Harwich to London, and there delivered to plaintiffs; and a reasonable time for carrying and delivering the same as aforesaid elapsed, yet defendants did not take care of the goods and safely deliver the same to plaintiffs, and that by and through the negligence of defendants, the goods were wholly lost to plaintiffs.

Third count. That at and after the delivery to defendants of the goods as hereinafter mentioned, defendants were owners of a certain ship then lying at Rotterdam and bound for Harwich, and plaintiffs caused to be shipped and delivered to defendants on board the ship certain pictures, on the terms, amongst others, that defendants should carry the same on board the ship from Rotterdam to Harwich, with liberty to tranship the goods on board any other craft, steamer, or railway, and deliver the same unto plaintiffs at the port of London viâ Harwich, certain perils and casualties excepted, for freight and other moneys to be paid by plaintiffs to defendants, and although a reasonable time for the carriage and delivery of the goods had elapsed, and although plaintiffs had done all things, &c., to entitle plaintiffs to have the goods delivered,

and although defendants have not been prevented by the excepted perils, yet they have not delivered the same to plaintiffs, and thereby the same were lost to plaintiffs.

Pleas: 1. To first count, that the goods were not delivered nor received on the terms alleged. 2. To the second count a similar plea. 3. To the second count, not guilty. 4. To the third count, that the goods were not shipped on the terms alleged.

5. To all three counts, that the goods were articles and property of the description mentioned in s. 1 of 11 Geo. 4 & 1 Wm. 4, c. 68, commonly called the Carriers Act, and were delivered or caused to be delivered by plaintiffs to defendants, then being common carriers by land for hire between Harwich and London, to be by them as such carriers by land carried from Harwich to London, and delivered to plaintiffs in London, and that the goods were contained in one package and exceeded 10*l.* in value; that the delivery was made to the servants of defendants, and that at the time of such delivery the value and nature of the goods were not declared by plaintiffs or the persons sending or delivering the same; and that the non-delivery of the goods to plaintiffs complained of was by reason of the same being lost by defendants out of their possession while the same were in the course of being carried by defendants from Harwich to London and delivered to plaintiffs in London, and while the same were in their possession and under their care as such carriers by land.

Issue taken on all the pleas, and demurrer to the fifth plea.

At the trial before Shee, J., at the sittings after Hilary Term, 1867, the following facts were admitted or proved. The plaintiffs are members of the firm of Pickford & Co., and carry on their business of carriers at Wood Street, London. The defendants were, on the 16th of October, 1865, the owners of a railway from Harwich to London, and also of a steamship called the *Avalon*, then lying at Rotterdam. The defendants also carried on the business of carriers between Rotterdam and London, viâ Harwich, the sea portion of the journey being performed by their steamships, and the land portion, viz., between Harwich and London, by the said railway.

On the 16th of October, 1865, one Joseph Marcus Parser,

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through Messrs. G. P. Ittman & Son, caused to be delivered to the agents of the defendants, at their office in Rotterdam, the case of pictures which is the subject of the action for carriage to London, and the defendants by their agents then signed a bill of lading in respect of the carriage of the said pictures, of which the following are the material parts:—"Shipped in good order, and well conditioned, by G. P. Ittman & Son, in and upon the good steamship called the *Avalon*, now lying in this port and bound for Harwich. . . . Address, Lewis B. Cowper, Lowestoft, one small case pictures, being marked and numbered as in the margin, with liberty to tranship the said goods or specie on board any other craft, steamer, or railway, and are to be delivered in the like good order and condition at the port of London viâ Harwich,—(the act of God, the Queen's enemies, pirates, restraint of princes, rulers and people, vermin, jettison, barratry and collision, fire on board in hulk or craft, or on shore, and all accidents, loss, and damage whatsoever from machinery, boilers, and steam, and steam navigation, or from perils of the seas and rivers, or from any act, neglect, or default whatsoever of the pilot, master, or mariners, in navigating the ship, as also railway accidents being excepted, and the owners being in no way liable for any consequences of the causes above excepted), unto Messrs. Pickford & Co., or to his or their assigns, he or they paying freight for the said goods. . . . Weights, contents, measure, quantity, and value unknown, and not answerable for leakage, lighterage, breakage, corruption, rust, torn wrappers, decay or mortality, and the wrong delivery of goods caused by error or by insufficiency in marks or numbers. The goods to be taken from the ship or railway by the consignees immediately after arrival, or the same will be transhipped into lighters, landed on the quays, or warehoused at the expense or risk of the owners of such goods. If the discharging of the goods is detained by the entry not being passed, the agents of the steamer or railway will have the power to enter them for account and risk of the owners of such goods. . . .

"For the Master, J. Wiltschut.

"Dated in Rotterdam, Oct. 16, 1865."

The case containing the pictures was placed on board at Rotterdam, and unshipped at Harwich, and was, about the 18th of October loaded upon train of the defendants and despatched by

them to London. It never was delivered by the defendants to Messrs. Pickford & Co., having been lost in course of transit between Harwich and London.

No declaration of value of the case was ever made. There was no notice affixed in the defendants' office at Rotterdam requiring a higher rate to be paid in the case of articles of value.

The verdict was entered for the plaintiffs for 84*l.*, the value of the pictures, leave being reserved to move to enter the verdict for the defendants upon the 5th plea.

A rule nisi having been obtained on the ground that the 5th plea was proved, the demurrer was argued with the rule; and the Court of Queen's Bench on the 21st of April, 1868, gave judgment for the defendants on the demurrer, and made the rule absolute. (1)

Murphy (*Edwyn Jones* with him), for the plaintiffs. First, the 5th plea is bad and affords no answer to the declaration. The first and third counts clearly allege a special contract on which the goods were to be carried by the defendants. The plea admits this contract, and the protection of the Carriers Act (2) cannot be

(1) The plaintiff's counsel contended that, conceding the contract as to the sea and land carriage to be divisible, the bill of lading was a special contract within s. 6 of the Carriers Act, and the defendants were therefore not entitled to the protection given in s. 1. The terms, however, of the exception in the bill of lading appear not to have been fully brought to the notice of the court; and the court (Mellor, Lush, and Hannen, JJ.), without calling upon the defendant's counsel, gave judgment for the defendants, and made the rule absolute, on the ground, that the contract was divisible, and that as to the land carriage there was *no* special contract; the plea was therefore good and proved.

(2) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1, enacts, in effect, that no common carrier by land for hire shall be liable for the loss of or injury to any article or articles of the descriptions following, inter alia, paintings, engravings, pictures, contained in any parcel or package which shall have been delivered to be carried for hire, when the value of such article or articles contained in such package or parcel shall exceed 10*l.*, unless at the time of the delivery at the office or to the servant of the common carrier the value and nature of the articles shall have been declared by the persons delivering the same, and such increased charge as thereinafter mentioned be accepted by the person receiving the parcel.

s. 6: "Provided also, and be it further enacted, that nothing in this Act contained shall extend, or be construed to annul, or in anywise affect, any special contract between such mail contractor, stage-coach proprietor, or common carrier, and any other parties for the conveyance of goods and merchandizes."

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set up as a defence; for s. 6 exempts the case of special contracts from the operation of the statute. Therefore the plea is bad.

Secondly, assuming the allegations on the record not to be such as to exclude the defence of the Carriers Act, on the facts stated in the special case the plea was not proved. The pictures were received by the defendants on the terms of the bill of lading, and this is a special contract within the Carriers Act, for the contract need not be in writing nor signed: *Walker* v. *York and North Midland Railway Company.* (1) Now, the goods having been received on the terms of the special contract contained in the bill of lading, to be carried from Rotterdam to Harwich and thence to London, the material allegation in the plea that the goods were received by the defendants as common carriers for that part of the transit between Harwich and London is disproved. For even conceding that the contract is divisible, as was held in *Pianciani* v. *London and South Western Railway Company* (2), and *Le Conteur* v. *London and South Western Railway Company* (3), here the second part of the conveyance might, by the terms of the agreement, have been by sea, for it contemplates the possibility of the goods being transhipped at Harwich, and so conveyed by water to London. How, then, can it be said that the goods were received by the defendants as common carriers by land from Harwich to London? But, moreover, even the terms of the contract applicable to the land transit exclude the possibility of the receipt being as common carriers, for the liability for railway accidents or breakage is excepted, as to both of which a common carrier would be liable. It is this fact of there being a special contract by the bill of lading which distinguishes the present from the two cases already cited. In neither was there any special contract, and in *Pianciani* v. *London and South Western Railway Company* (2), (from which it appears the present 5th plea was taken), it was expressly alleged in the declaration that the goods were received by the defendants as common carriers.

[KELLY, C.B. May there not be a special contract which does not exclude the protection of the Carriers Act?]

When parties enter into a special contract, they must be taken

(1) 2 E. & B. 750; 23 L. J. (Q.B.) 73. (2) 18 C. B. 226.
(3) Law Rep. 1 Q. B. 54.

to intend to be bound by the terms of the contract alone, and no other conditions ought to be imported.

C. W. Wood, for the defendants. There is nothing on the face of any one of these counts to shew that as to the land journey there was any special contract; and it being clear, on the authorities, that the contract is divisible, the plea which is pleaded to the land journey only is good. Secondly, the plea was proved. The bill of lading was not signed by the plaintiffs or the consignors, consequently there was no binding special contract. *Walker* v. *York and North Midland Railway Company* (1), and *Great Northern Railway Company* v. *Morville* (2), were decided before the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) had passed; and by one of the last provisos in s. 7 of that act a special contract between a railway company and other parties is not binding unless signed by the persons delivering the goods. (3)

[CHANNELL, B. The effect of that proviso is only that the railway company shall not protect themselves by any special contract, unless it be in writing signed by the other party.]

Conceding, then, that there is a special contract here, it is not such a contract as excludes the defendants from availing themselves of the protection of s. 1 of the Carriers Act; for s. 6 only provides that nothing in the Act "shall extend or be construed to annul or anywise affect any special contract between a common carrier and any other parties for the conveyance of goods." In other words, though a common carrier has entered into a special contract, he may avail himself of the protection of the Act, provided the terms of the contract are not inconsistent with such protection.

[KELLY, C.B. It is urged on behalf of the plaintiffs that as railway accidents are excepted by the bill of lading from the defendants' liability, that is inconsistent with the goods having been received by them as common carriers.]

(1) 2 E. & B. 750; 23 L. J. (Q.B.) 73. 18 Jur 143

(2) 21 L. J. (Q.B.) 319.

(3) 17 & 18 Vict. c. 31, s. 7, ad finem: "Provided also, that no special contract between such company (railway or canal company), and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage."

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The parties have only entered into a contract which, to a certain extent, limits the respective rights and liabilities at common law of a common carrier and his customer; but the rights and liabilities not provided for by the contract remain, consequently the defendants are still liable as common carriers in events as to which they have not provided; and the correlative protection of the Carriers Act must also remain.

Murphy, in reply. The Railway and Canal Traffic Act has no application to the present case, for the reason already pointed out from the Bench; and there was, therefore, a special contract binding on the defendants, notwithstanding the consignors did not sign the bill of lading. It has always been taken for granted, that if the parties enter into a special agreement for the carriage of goods, the contract by the carrier cannot be quà common carrier, and his liability as common carrier ceases, and consequently the protection which he enjoys quà common carrier under the statute ceases also. In *De Rothschild* v. *Royal Mail Steam Packet Company* (1), which involved property of a large amount, the point now raised for the first time was never thought of, though it was open to the defendants on the facts, and would have been conclusive in their favour.

[PIGOTT, B. How does the protection of s. 1 of the Carriers Act "annul or in anywise affect" the present contract?]

It does not annul the contract; but the parties having agreed on what express terms the goods shall be carried, viz., that the defendants shall not be liable for railway accidents or breakage, and with the still wider exemption as to error in delivery, it follows that to import into the contract the additional protection of the Carriers Act is certainly to "affect" the contract most materially.

KELLY, C.B. We are of opinion that the judgment should be affirmed. The question before us is raised in two ways—first upon the demurrer, and, secondly, upon the special case. Upon the demurrer, the question is, whether the 5th plea is a good plea, and an answer to the whole declaration. The declaration in the first and third counts alleges a contract, which contract is twofold. It is a contract to convey from Rotterdam to Harwich, and to convey

(1) 7 Ex. 734; 21 L. J. (Ex.) 273.

from Harwich to London. The second count alleges a contract to convey from Harwich to London only. The plea in effect says that according to the contract in these three counts the goods were delivered to the defendants in their capacity of common carriers as far as relates to that part of the contract which was for the conveyance of the goods from Harwich to London, and, the goods being of the value of more than 10*l.*, that under the statute they were entitled as common carriers to a notice, and that, no notice having been given, they are not liable for the loss of the goods. The objection that has been made by the plaintiffs is, that that is no answer to the action founded on the contract stated in the first and third counts. It is quite enough to say, without reference at all to that part of the contract which relates to the conveyance from Rotterdam to Harwich, that the contract in each of the three counts expressly states that the goods were to be conveyed by the railway company viâ Harwich to London; therefore we may assume it means by railway or by land from Harwich to London; and the answer set up by the defendants is, that the goods were to be conveyed under that contract, but the contract was, that they were to be conveyed by us in our character of common carriers from Harwich to London, and then the exemption or non-liability arises under the statute. We think, therefore, the 5th plea is a good answer to the whole declaration.

Then a more serious question arises, whether the 5th plea was proved. Now, looking at the whole of it, the only important point upon which any question can be raised is, whether the allegation that these goods were delivered to the defendants as common carriers by land, to be conveyed by them in their capacity of common carriers from Harwich to London, is proved upon the evidence that appears upon the special case. It has been insisted upon several grounds that the plea is not proved. The first ground is, that the contract under which these goods were delivered to the defendants, and were to be conveyed by them in effect from Rotterdam to London, is a contract by means of a bill of lading, and that that bill of lading, which is a marine contract, imports that they were to be conveyed by the defendants in their capacity of carriers by water. Now it is quite enough to say that, upon looking at the bill of lading itself, it is perfectly clear that it contemplated, not only the

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conveyance by water from Rotterdam to Harwich, but the conveyance by railway from Harwich to London. It is true that, upon the terms of the bill of lading, it would have been competent to the defendants to tranship these goods at Harwich from the *Avalon* into another vessel and to convey them by sea and by river from Harwich to London; but it is equally clear, upon looking at the bill of lading, and the words which are the foundation of the chief argument in the case, viz., "as also railway accidents being excepted," that the bill of lading contemplated also the possibility at least in performance of the contract of a conveyance by railway for some portion of the transit, and it must have been by railway from Harwich to London. The contract, therefore, contemplates a conveyance partly by land, and, the contract being divisible, the first objection falls to the ground.

The next objection is, that the bill of lading constitutes a special contract within s. 6 of the Carriers Act. To this objection one answer which was given on behalf of the defendants was, that the Railway and Canal Traffic Act (17 & 18 Vict. c. 31) applied, and the plaintiffs have not made out that there was any special contract within s. 7 by reason of the bill of lading, which constitutes the special contract, not having been signed by the consignors of the goods; but when we look at the clause we find it applies only to cases in which the railway company are seeking to exempt themselves from liability by reason of there being a special contract, and in such a case the statute says the other party shall not be bound by any contract which they or the person delivering the goods have not signed; therefore the statute has no application to the present case. And that being so, there is a special contract; and the question is, whether that is a special contract within s. 6 of the Carriers Act. Now, the Carriers Act, which by the 1st section exempts carriers from liability by reason of the loss of goods of greater value than 10*l.* where they have not had notice of the nature and value, provides in the 6th section that nothing in the Act shall extend, or be construed to annul, or in anywise affect, any special contract under which goods are carried; and it is said that this is a special contract within the meaning of s. 6. But it is clear that the 6th section applies only to contracts, the provisions of which are inconsistent with the exemption claimed by the car-

riers under the 1st section. Any contract which would render the carriers liable for the loss of goods beyond the value of 10*l*., whether they shall have had notice of the value or not, is a special contract which is not to be affected at all, but shall have full force and effect, notwithstanding the exemption conferred upon them as common carriers by the 1st section.

The last and chief objection that is made is, that when we look at this contract by the bill of lading, it is clear that this is not a contract at all with the defendants in their capacity of common carriers; that the terms of the contract are such as to obliterate and destroy their character of common carriers, and to shew it is upon the particular contract contained in the bill of lading alone that the goods are carried, in which their capacity of common carriers could form no part, and in which that character could be no element in the consideration and construction of the contract. Looking at the bill of lading, it is found to contain these words,—after excepting a great variety of sources or causes of loss or mischief which are entirely of a marine nature, and which apply only to so much of the transit as was between Rotterdam and Harwich, the bill of lading proceeds: "Also railway accidents being excepted, and the owners being in no way liable for any consequences of the causes before excepted." Therefore the plaintiffs say, inasmuch as the defendants, as common carriers, are undoubtedly liable for loss by railway accidents, whereas by this contract they are exempted from any such loss, the very contract itself shews that the goods were not delivered to them in their capacity of common carriers. It is an answer to that objection to say the contract amounted only to this: "We (the plaintiffs) deliver these goods to you (the defendants) to be conveyed from Harwich to London in your capacity of common carriers; but whereas you would, as such carriers, be liable to loss arising from railway accidents, we will specially exempt you from that liability." It is merely a particular exception engrafted on the contract, which, as to all else, is a contract with the defendants in their character or capacity of common carriers. But the bill of lading goes further, and says the defendants are also exempted from liability in case of breakage. To that the same observation applies. Still further on we find that they are also not to be liable for the wrong delivery

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of goods caused by error or by insufficiency in marks or numbers. To read these words according to their strict grammatical construction would be saying the defendants were to be exempt from any liability by reason of a wrong delivery caused by any error, which would be any error of their own. That would be something very extravagant indeed, and might, for aught I know, do away altogether with their character of common carriers. But when we look at the whole sentence, it seems clear that the meaning is, they are not to be liable for a wrong delivery of goods caused by error,—and although the word "by" is put in before "insufficiency," we must read it as if "by" were not in—"caused by error or insufficiency in marks or numbers." If there be any error or insufficiency in marks or numbers by reason of which the defendants are misled, and so a wrong delivery takes place, they are not to be liable in such case. All these exceptions are introduced by the special provisions of the contract, and the further exception of goods beyond the value of 10*l.*, not declared, is superadded by the statute.

Under these circumstances it appears to us all, that the true effect of this contract by means of the bill of lading is, that these goods were delivered, as far as relates to the conveyance of them from Harwich to London, to the defendants in their character of common carriers; and they were to have all the liabilities of common carriers except only those which are excepted in the bill of lading; and they are also entitled, as common carriers, to the protection from liability which was conferred upon them by the act of parliament.

We think, therefore, the judgment of the Court of Queen's Bench was right, and must be affirmed.

CHANNELL, PIGOTT, and CLEASBY, BB., BYLES, KEATING, and MONTAGUE SMITH, JJ., concurred.

Judgment affirmed.

Attorney for plaintiffs: *Spaull.*

Attorneys for defendants: *Ashley & Earle.*

SIMPSON *v.* MIRABITA.

1869
Jan. 25.

Bankrupt—Irish Bankruptcy Act (20 & 21 *Vict. c.* 60), *ss.* 143–148—*Effect of Certificate of Conformity or Order of Discharge—Costs barred, though Verdict and Judgment after Bankruptcy.*

An action was commenced on the 2nd of October in England for a debt contracted there. On the 20th of November the defendant was adjudged bankrupt by the Irish Court of Bankruptcy, in Dublin. On the 10th of December the plaintiff obtained a verdict. On the 8th of January the costs were taxed, and judgment having been signed, a ca. sa. issued for the debt and costs. On the 12th of January the defendant passed his last examination, and obtained a certificate of conformity, under 20 & 21 Vict. c. 60, ss. 142, 143, sch. (O), which was duly signed on the same day, but remained in court, one month being allowed for any creditor to appear against its being granted. On the 13th of January the defendant was arrested in London under the ca. sa. :—

Held, that the certificate of conformity took effect from its date; that it discharged the defendant, not only from the plaintiff's debt, but from the costs also as incident thereto, although they were not proveable under the bankruptcy; and that the defendant was therefore entitled to be immediately discharged out of custody.

Maughan v. *Vinesberg* (Law Rep. 3 C. P. 318), dissented from.

Pur. 27.3. 573 5 Q.B. 223.

THIS action was commenced on the 2nd of October, 1868, the plaintiff and the defendant at that time both carrying on business in London, and the cause of action being for a debt contracted in London. The defendant pleaded on the 10th of November, but at the trial in London, on the 10th of December, did not appear, and a verdict passed for the plaintiff for 67*l.* 17*s.* 6*d.* The costs were taxed on the 8th of January, 1869, at 34*l.* 15*s.* 10*d.*, and judgment having been signed, a ca. sa. issued indorsed for the debt and costs, and the defendant was arrested by the sheriffs of London on the 13th of January.

The defendant had been adjudged a bankrupt, on a creditor's petition, in the Irish Court of Bankruptcy, at Dublin, on the 20th of November, 1868. The plaintiff's debt was inserted in the schedule. After one or two previous meetings, on the 12th of January, 1869, at a meeting held for the purpose, the defendant passed his last examination, and received, as he deposed, a first-class certificate. A protection order was at the same time granted, purporting to give him protection till the 12th of February, one month being allowed for any creditor to appear against the certifi-

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cate being granted. (1) On his arrest in London on the 13th of January, the defendant produced this protection order, but the officer refused to release him. The plaintiff had no previous knowledge of the defendant's bankruptcy.

Application was made to Blackburn, J., at chambers, and he, on the 15th of January, made an order that the defendant should be discharged out of custody, unless within four days a rule should be obtained to set aside the order.

A rule having been obtained accordingly,

Garth, Q.C., and *Sharpe* shewed cause. The certificate of conformity under the Irish Bankruptcy Act (20 & 21 Vict. c. 60), ss. 143, 145 & 148 (2), operates as a discharge of the English as well

(1) The above are the terms of the defendant's affidavit. On the argument of the rule, it was stated and admitted by counsel that the "first-class certificate" was a certificate of conformity under the Irish Bankruptcy Act (20 & 21 Vict. c. 60), ss. 143, 144, in the usual form, sch. (O); and was dated and signed by the judge of the court on the 12th of January, 1869; but that by the practice of the court the certificate remained in court for one month, in order to allow of any creditor appearing to object to its being granted, and protection from arrest was renewed till the 12th of February, in the usual way, upon the former order.

(2) 20 & 21 Vict. c. 60, s. 143:—"Forthwith, after the bankrupt shall have passed his last examination, if no prosecution shall have been directed by the court, nor any charge of fraud have been entered on the proceedings, nor any objection to the signing of the certificate be entered in the court, the certificate of conformity shall be prepared by the chief registrar, and signed by the court, and notice of the allowance of such certificate shall be advertised in the 'Dublin Gazette,' in such manner as may be directed by any general order; but if any objection to the granting of the certificate be made before or at the last examination, then the court shall appoint a public sitting for the allowance of the certificate, (whereof twenty-one days' notice shall be given in the 'Dublin Gazette'), and at such sitting or any adjournment thereof, the assignees, or any of the creditors of such bankrupt, may be heard against the allowance of such certificate; and the court having regard to the conformity of the bankrupt to the law of bankruptcy, and to his conduct as a trader before as well as after his bankruptcy, and whether the allowance of such certificate be opposed by any creditor or not, shall judge of any objection against allowing such certificate, and either find the bankrupt entitled thereto, and allow the same, or suspend the allowance thereof for any period not exceeding three years."

By s. 144, the certificate of conformity is to be in the form in sch. (O), and signed by one of the judges of the court.

s. 145:—"The certificate of conformity shall, subject to the provisions herein contained, discharge the bankrupt from all debts due by him at the date of the filing of the petition of bankruptcy, and from all claims and

as the Irish debts; it was held to the contrary in *Phillips* v. *Allan* (1), but in the later case of *Ferguson* v. *Spencer* (2), the Court of Common Pleas in a considered judgment, after citing two Irish cases (*Tronson* v. *Callan*, and *Rogers* v. *Love*) (3), held that the certificate under the Irish commission barred all the bankrupt's liabilities, both to his Irish and English creditors. That decision was under the repealed act (6 & 7 Wm. 4, c. 14), but the terms of the present Irish act are essentially the same.

[COCKBURN, C.J. When the rule was moved, we were given to understand that the defendant had only a protection order, and not his final certificate.]

The defendant passed his final examination on the 12th of January, and obtained his certificate which was signed at the same time under s. 143; and although by the practice of the Irish Court the certificate remains in the court for a month, yet it must operate as a discharge from the day of the date, and the defendant, therefore, being discharged from this debt, was entitled to his discharge from arrest under the ca. sa.

THE COURT then called upon

Shaw, in support of the rule. The certificate being ordered to remain in court for a month, all that the defendant had in the meantime was a renewal of his protection under s. 134, and that is no protection in England, the Irish Act, by s. 410, not extending to England.

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demands proveable under the bankruptcy . . ."

s. 148 :—" Any bankrupt who shall, after his certificate shall have been allowed, be arrested or have any action brought against him for any debt, claim, or demand proveable under his bankruptcy, shall be discharged, and may plead in general that the cause of action accrued before he became bankrupt, and may give this act and the special matter in evidence; and such bankrupt's certificate shall be sufficient evidence of the trading, bankruptcy, petition for adjudication, and other proceedings precedent to the obtaining such certificate; and if any such bankrupt shall be taken in execution or detained in prison for such debt, claim or demand, it shall be lawful for any judge of the court wherein judgment has been so obtained, on such bankrupt producing his certificate, to order any officer who shall have such bankrupt in custody by virtue of such execution to discharge such bankrupt, without exacting any fee, and such officer shall be hereby indemnified for so doing."

(1) 8 B. & C. 477.

(2) 1 M. & G. 987, 1002.

(3) 1 Huds. & Br. 113; and 484, n.

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[COCKBURN, C.J. The protection order was all that the defendant had to produce to the sheriff; but at the time of arrest he had obtained his certificate of conformity, which is equivalent to the order of discharge in this country. The debt itself, therefore, was gone at the date of the arrest under the ca. sa.; and, consequently, he is entitled to his discharge.]

The certificate of conformity is in effect suspended.

[MELLOR, J. Though remaining in court, unless the statute says (which I understand it does not) that the certificate shall not take effect till the lapse of one month, or such time as the Court shall direct, it must have immediate operation from its allowance.]

Assuming that to be so, the debt itself is discharged, but not the costs. These costs were not proveable, the verdict and judgment being after the bankruptcy; for s. 261 of the Irish Act (corresponding to s. 181 of 12 & 13 Vict. c. 106) only renders costs proveable where the judgment is obtained before the bankruptcy. In Griffith's Bankruptcy, vol. i. p. 590, it is laid down, that where a verdict and judgment are after the bankruptcy in an action previously brought, whether for a debt by contract or for damages in tort, the costs cannot be proved as a debt under the bankruptcy; and *Ex parte Hill* (1), and *Ex parte Poucher* (2), are cited for the proposition, which they fully bear out. It is true that some doubt was expressed in those cases whether the certificate did not, notwithstanding, discharge the bankrupt from the costs. But it was expressly held to the contrary in the late case of *Maughan* v. *Vinesberg* (3); and that case is undistinguishable from the present.

[COCKBURN, C.J. The Court will hear the defendant's counsel on this point.

HAYES, J. In *Ex parte Poucher* (4), Sir John Leach, V.C., says: "I adopt the conclusion drawn by the Lord Chancellor (Eldon) in *Ex parte Hill* (1) from his laborious and powerful discussion of all the authorities, that even in an action upon contract, if a verdict be not obtained till after the bankruptcy, the costs which result from the verdict and judgment are not proveable under the commission; and I incline strongly to the opinion, that the costs of all proceedings in all actions upon contract, which for

(1) 11 Ves. 646.
(2) 1 Gl. & J. 335, 386.
(3) Law Rep. 3 C. P. 318.
(4) 1 Gl. & J. at p. 386.

want of a previous verdict are not proveable under a commission, are yet barred by the certificate, together with the original debt."]

Garth, Q.C. It must be conceded that *Maughan* v. *Vinesberg* (1) is not distinguishable from the present case; but it is contrary to what has been considered undoubted law for many years. Thus, in Shelford's Bankruptcy, 3rd ed. pp. 608—9, it is said: "If a verdict and judgment after bankruptcy were obtained in an action brought previously for an antecedent debt by contract, the costs, though not proveable under the bankruptcy, were barred by the certificate as accessory to the original debt, which was barred." And in addition to the two cases already referred to from the Chancery courts, the cases of *Willett* v. *Pringle* (2), and *Scott* v. *Ambrose* (3), are cited; and these two cases are express authorities that the bankrupt is discharged from the costs as well as the debt.

COCKBURN, C.J. The older cases are conclusive authorities that the costs, in such a case as the present, though not proveable as a debt under the bankruptcy, are barred by the certificate as incident to the original debt, which is barred. These cases were not brought to the notice of the Court in *Maughan* v. *Vinesberg* (1), which case appears not to have been much considered nor fully argued. We have, therefore, to choose between that and the older cases; and as they cannot be said to have been overruled, we prefer to follow them, and decline to be bound by the later case. In the present case, therefore, the defendant was discharged from both the debt and costs, and the arrest therefore cannot be sustained as to either, and he is entitled to his immediate discharge.

MELLOR and HAYES, JJ., concurred.

Rule discharged without costs.

Attorney for plaintiff: *F. Bradley.*
Attorneys for defendant: *Wimburn, Collett, & Co.*

(1) Law Rep. 3 C. P. 318. (2) 2 N. R. 190.
(3) 3 M. & S. 326.

1869
Feb. 11.

LAWLESS *v.* THE ANGLO-EGYPTIAN COTTON AND OIL COMPANY.

Libel—Privileged Communication—Malice, Evidence of—Company.

The plaintiff was employed as manager of the factories of a joint-stock company, and the auditors of the company, in auditing the plaintiff's accounts, appended to their report the following statement:—"The shareholders will observe that there is a charge of 1306*l.* for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." The directors submitted their own report, together with that of the auditors, to the ordinary general meeting of the shareholders of the company, according to the usual practice, and it was resolved by the meeting that the reports should be printed and sent to the shareholders. The reports, including the above statement, were accordingly sent to a printer, printed, and circulated among the shareholders, and used at an adjourned meeting of the shareholders. The plaintiff having brought an action for libel against the company:—

Held, that, as it was the duty of the directors to communicate the report of the auditors to the shareholders, and it was for the interest of all the shareholders to be informed of the report, the printing and publication of the reports were primâ facie privileged; and that there was no evidence of express malice for the jury.

DECLARATION that the plaintiff was manager of the defendants' company at wages or salary payable to him in that behalf, and then used and exercised and carried on the occupation and business of a manager of companies, and thereby derived great gains and profits. That the defendants, well knowing the premises, falsely and maliciously printed and published of the plaintiff, as such manager, in a certain printed report of the trade finances and affairs of the company, the words following: "The shareholders will observe that there is a charge of 1306*l.* 1*s.* 7*d.* for deficiency of stock, which the manager (meaning plaintiff) is responsible for; his (meaning plaintiff's) accounts as such manager in the company have been badly kept, and have been rendered to us very irregularly" (meaning thereby that the plaintiff whilst he was so employed as such manager of the company had been guilty of improper conduct as such manager in the company, and that by reason thereof the defendants had incurred and sustained loss to the amount of 1306*l.* 1*s.* 7*d.*; and further that the plaintiff had in breach of, and contrary to his duties as such manager in the company kept and rendered his accounts in a careless, irregular,

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and improper manner). The declaration also alleged special damage.

Plea: Not guilty. Issue thereon.

At the trial before Kelly, C.B., at the last Lancashire summer assizes, at Manchester, it appeared that the defendants were a registered joint-stock company, limited, and carried on the business of ginning and packing cotton and making oil, and had factories in Egypt, their head office being at Manchester. The plaintiff became their manager in Egypt in 1865 for three years, and it was his duty to render accounts to the company of the purchases made, the quantity of cotton and oil in stock, and the expenses incurred. The half-yearly accounts made up to the 31st of March, 1867, were received by the defendants from the plaintiff and laid before the auditors of the company, who, assisted by a Mr. Bell, a shareholder and officer of the company, made out a balance-sheet and revenue account, and duly audited the accounts. The revenue account shewed on one side the purchases and on the other the sales, and the last item entered on one side of the account was "deficiency in stock, 1306*l.* 1*s.* 7*d.*" Mr. Bell explained to the auditors that this last item, though entered as a deficiency, was, in truth, only a depreciation in the value of the stock, for which the manager was not answerable; but the auditors notwithstanding added at the foot of the account: "We certify that the accounts as above stated are correct. Shareholders will observe that there is a charge of 1306*l.* 1*s.* 7*d.* for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." At the ordinary general meeting of the shareholders held on the 1st of October, 1867, the report of the directors, together with the accounts and the report of the auditors, was read as usual to the meeting. A discussion arose as to the item of deficiency, and the report of the auditors. Mr. Bell attempted to explain that the item was really depreciation of the stock, and that there was no deficiency, but the meeting refused to hear him. By a resolution passed at the meeting the report of the directors with the accounts and the report of the auditors were ordered to be printed and sent to the shareholders at large, and they were accordingly sent to a printer, printed, and afterwards circulated amongst the share-

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holders and used by them at an adjourned meeting held on the 10th of October.

The following of the articles of association are material:—

"Art. 93. That the directors shall cause true accounts to be kept of the stock-in-trade and effects of the company, of the sums of money received and expended by the company, and the matters in respect of which such receipts and expenditure take place, and of the credit and liabilities of the company. 95. Once at least in every year the directors shall lay before the company in general meeting a report accompanied by a statement of the income and expenditure for the past year, made up to a date not more than three months before such meeting. 97. A balance-sheet shall be made out in every year and laid before the company in general meeting, and such balance-sheet shall contain a summary of the property and liabilities of the company arranged under proper heads. 99. Twice at the least in every year the accounts of the company shall be examined and the correctness of the balance-sheet ascertained by one or more auditor or auditors. 108. Every auditor shall be supplied with a copy of the balance-sheet, and it shall be his duty to examine the same with the accounts and vouchers relating thereto. 110. The auditors shall make a report to the members upon the balance-sheet and accounts, and in every report they shall state whether in their opinion the balance-sheet is a full and fair balance-sheet containing the particulars required by these regulations, and properly drawn up so as to exhibit a true and correct view of the state of the company's affairs, and in case they have called for explanations or information from the directors whether such explanations or information have been given by the directors, and whether they have been satisfactory, and such report shall be read together with the report of the directors at the ordinary meeting."

It was objected on behalf of the defendants that there was no evidence of a publication of the libel, and that it was a privileged communication. The Chief Baron overruled the objections, but reserved leave to the defendants to move to enter a nonsuit on both points. The plaintiff having proved his special damage, the jury found a verdict for 500*l*.

A rule having been obtained to enter a nonsuit pursuant to the leave reserved,

Holker, *Q.C.*, and *Gorst*, shewed cause. The publication of this statement is not, under the circumstances, a privileged communication. Suppose the mayor of a corporate borough had reflected on the conduct of the surveyor of the borough at a meeting of the corporation, a burgess present would not be justified in repeating the slander to every other burgess. The claim of privilege in such a case would be too large. The communication to be privileged ought to have been made only to the shareholders who

were present; the shareholders who were present had no right nor duty, by a resolution, to order an injurious statement made at a meeting to be printed and circulated amongst the absent shareholders. The shareholders, no doubt, are interested in the prosperity of the company, but if they want information as to its state they must attend the meeting, and everything that passes there and is communicated privately may be privileged; but the publication of the libellous statement to the printer destroys the privilege. *Martin* v. *Strong* (1) is to some extent in point; there a communication, made by one subscriber to a charity to another, in answer to inquiries by the latter on matters relating to the charity, was held not to be privileged. In Manley Smith on Master and Servant, p. 266, it is stated, "In a recent case in America in which a railroad corporation was held liable, in its corporate capacity, for a libel published by its agents in the course of its business and of their employment, it was held to be within the course of its business and the employment of the president and directors, for them to investigate the conduct of their officers and agents, and report the result to the stockholders. It was also held that, in the absence of malice or bad faith, a report to the shareholders was privileged; but that such privilege did not extend to the preservation of the report and evidence in a book for distribution amongst the persons belonging to the corporation; and the corporation was held liable for publishing it in that form": *Philadelphia, Wilmington, and Baltimore Railroad Company* v. *Quigley*. (2) So here reading the report of the auditors at the meeting may be privileged, but publishing it in a printed form is in excess of the privilege. No doubt a subject matter, in which the party communicating has an interest, or in reference to which he has a duty, is privileged, if made to a person having a corresponding interest or duty: *Harrison* v. *Bush* (3); but in *Blagg* v. *Sturt* (4), a letter to the Secretary of State complaining of the conduct of the town clerk of a borough was held not to be privileged, because not made to a person having an interest in having the complaint made; so here there is a publication to the

(1) 5 A. & E. 535.

(2) 21 Howard (Rep. Sup. Court, U.S.) 202.

(3) 5 E. & B. at p. 348; 25 L. J. (Q.B.) at p. 29.

(4) 10 Q. B. 899.

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printer who had no interest whatever in the subject matter of complaint.

[MELLOR, J. In *Toogood* v. *Spyring* (1) it was decided that the presence of a third person, when a charge of drunkenness was made against the plaintiff, did not destroy the privilege.]

That was because the third person was unavoidably present.

Even although the communication be privileged, yet if there be evidence of malice the action would lie: *Jackson* v. *Hopperton.* (2) The Chief Baron having ruled that the libel was not privileged, the plaintiff was precluded from having the question of express malice left to the jury. The facts of the publication to the printer and the meeting refusing to hear Mr. Bell's explanation were evidence of malice: *Cooke* v. *Wildes.* (3) The rule, no doubt, is to enter a nonsuit, but if there has been a miscarriage of justice the Court will modify the rule, and grant a new trial.

Manisty, Q.C. (*R. C. Fisher* with him), in support of the rule. The defamatory statement complained of was contained in the report of the auditors, who are bound to make a true report to the directors; the publication of this report by the directors to the shareholders, it is quite clear, is privileged. It would have been a misdirection if the Chief Baron had left the question of malice to the jury, unless the evidence raised a probability of malice: *Somerville* v. *Hawkins* (4); *Taylor* v. *Hawkins.* (5) Here there was no evidence whatever of malice. [He was then stopped by the Court.]

MELLOR, J. I am of opinion that the rule should be made absolute to enter a nonsuit. Had I been able to perceive that any substantial injustice might have been done by not leaving any question to the jury, I should have been disposed to send the case down for a new trial. But I think there was no evidence of express malice which ought to have been left to the jury.

As I understand the facts of the case, the plaintiff was employed as the agent of the defendants in Egypt, and his transactions were necessarily brought under the notice of the auditors, who are

(1) 1 C. M. & R. 181.
(2) 16 C. B. (N.S.) 829.
(3) 5 E. & B. 328; 24 L. J. (Q.B.) 367. 1 Jur. N.S. 610
(4) 10 C. B. 583; 20 L. J. (C.P.) 131.
(5) 16 Q. B. 308; 20 L. J. (Q.B.) 313.

appointed by act of parliament, or at all events by the articles of association of the company, and who are fit persons to investigate the accounts of the company. The auditors considered that a deficiency in the stock of the company was owing in some sense to the plaintiff's default, and they expressed that opinion in their report. It seems they did this after having received such explanations as Mr. Bell could offer, but it must be observed that those explanations were offered to the auditors and not to the directors. What the directors did was this, in their report to a meeting of the shareholders they appended the statement which had been made to them by the auditors. There is nothing whatever to shew that the directors had any reason to doubt the truth of that statement, and there was no evidence of any act on their part from which malice could be inferred, and therefore I think the Chief Baron was right in not putting the question of malice to the jury. As to the question of intrinsic or extrinsic evidence, the report was one which the directors were fully warranted in believing was correct; and there is nothing to shew that the directors acted otherwise than bonâ fide in communicating it to the shareholders. No doubt the directors are to make their report to a meeting of the shareholders, to be called for that purpose, and it is clear that those who are absent are bound by the acts of those who are present, but the absent shareholders are interested in the prosperity or adversity of the company, and in knowing all the circumstances upon which the welfare of the company depends. It seems to me, therefore, that to print the report was a necessary and reasonable mode of communicating it to all the shareholders, who must be more or less numerous.

This case does not fall within the rule in *Cooke* v. *Wildes*. (1) There the question of malice was properly left to the jury, because the letter contained defamatory expressions which were unnecessary; the defendant was not content with stating the facts that he had heard, but he made a calumnious observation of his own and put a gloss on the plaintiff's conduct which was libellous. There was therefore intrinsic evidence of malice, and that the defendant had not acted bonâ fide, and these questions were properly left to the jury. I think we are bound by the cases of *Somerville* v.

(1) 5 E. & B. 328; 24 L. J. (Q.B.) 367.

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Hawkins (1), and *Taylor* v. *Hawkins*. (2) The principle there laid down is, that where there is no evidence of malice the judge ought not to leave any question to the jury. Here I think the conduct of the directors negatives malice on their part, and it is clear that they acted bonâ fide. I think we should be going against what I may call progress, if we were to hold that the delivery of the manuscript of the report to the printer, for the purpose of having it printed, is a publication which prevents the communication from being privileged. I also think that it was the duty of the directors to communicate the report not only to the shareholders present at the meeting, but to all the shareholders, and that they had an interest in receiving it. I am glad that Mr. Holker called our attention to the American authority, for it supports the judgment of the Court. In *Philadelphia, Wilmington, and Baltimore Railroad Company* v. *Quigley* (3) it was held that it was within the course of business and employment of the president and directors for them to investigate the conduct of their officers and agents, and to report the result to the stockholders. It was also held, in the absence of malice and bad faith, that the report to the shareholders was privileged; therefore, to this extent, that case appears to me to be an express authority. But, independently of any authority, I am quite prepared to hold that a company, having a great number of shareholders all interested in knowing how their officers conduct themselves, are justified in making a communication in a printed report, relating to the conduct of their officers, to all the shareholders whether present or absent, if the communication be made without malice and bonâ fide. The communication in this case is primâ facie privileged, and there being no evidence intrinsic or extrinsic of malice, that question was very properly not left to the jury. I think the conclusion at which the Chief Baron arrived at nisi prius without hearing any argument erroneous, and with great deference to that eminent and learned judge, I am of opinion this rule to enter a nonsuit should be made absolute.

HANNEN, J. I feel strongly that the question is one upon which I ought to express myself with great diffidence, since I find my

(1) 10 C. B. 583; 20 L. J. (C.P.) 131. (2) 16 Q. B. 308; 20 L. J. (Q.B.) 313.
(3) 21 Howard (Rep. Sup. Court, U.S) 202.

opinion is in direct opposition to that of the Lord Chief Baron, but it becomes my duty to express my opinion, and I think that this occasion was a privileged occasion, and that therefore it rebuts the inference of malice which is primâ facie presumed to exist when a defamatory statement is published of another. I confess I cannot bring myself to understand how it can be thought that the directors of a company, who have been obliged by the articles of association to employ auditors to investigate their accounts, and to receive from those auditors a report expressing their opinion upon the state of the accounts, can be held to be acting beyond the scope of their duties in communicating, simpliciter without one word of comment of their own, that report of the auditors to their shareholders. I confess that I go so far as to say that I think it was the duty of the directors to do so, and that the failure of the directors to report to the shareholders a statement, made by the auditors upon their own responsibility of what they found to be the state of the accounts, might have led the directors into a position of great difficulty. I think, therefore, that the fact of merely communicating the report to the shareholders was in itself privileged.

There remains the question of whether or not there was any intrinsic or extrinsic evidence which ought to have been submitted to the jury of express malice. It is perfectly clear that a case of express malice was not relied upon by the plaintiff's counsel at the trial, because, if he did rely upon a case of express malice, it was his duty to have told the Chief Baron that he had a case behind which would render it unnecessary for the judge to determine whether or not the communication was privileged, instead of which he acquiesced in the reservation of this very question, whether, in the event of the Chief Baron being wrong in holding the communication not privileged, a nonsuit should be entered. I can find no intrinsic evidence of express malice, but as I have already observed it is a communication to the shareholders, without any comment, of the report the auditors had made. With regard to the extrinsic evidence, there are two points relied upon. The one is that this communication was made by means of a printer. That point does not appear to have been made at the trial, and it seems to me that there is nothing in it. It is obvious that a company itself cannot communicate by writing, it must communicate by the aid

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of some person to whom it deputes the duty of making the communication, and if the argument of the plaintiff's counsel were pushed to its logical conclusion it would amount to this, that a company must employ one of the shareholders to write, or if he be a printer to print, the reports which they wish to communicate to the other shareholders. I think that this mode of communication might in some circumstances be a fact to go to the jury as evidence of express malice; but it was not suggested that the directors had departed in any way from what was the usual course, having regard to the exigencies of business and the necessary means of making known that which they thought ought to be made known to the shareholders at large.

The other point was that some observations were made by Mr. Bell which might have put the shareholders on inquiry; but those observations had already been made to the auditors who, notwithstanding what Mr. Bell had said, had thought it their duty to make the report to the directors. The proper course for the directors to adopt was to let the shareholders know what the auditors had said, and then it became a proper subject of investigation for all parties interested.

I need say nothing on the authorities cited. I concur with my Brother Mellor that the American case is directly in point, and adverse to the plaintiff's argument. The latter part of it is applicable to circumstances which do not exist here; if, after the report had served its purpose by making known to the shareholders facts which it was their interest to know, the statement had been entered in the books of the company to stand for ever a record against the plaintiff, that he had had an accusation made against him, that might have been independent evidence of malice on the part of the company. In the absence of any such act as that, it simply remains that the directors have done what the court in America thought was a privileged act. For these reasons I think that the rule should be made absolute for a nonsuit.

Rule absolute.

Attorney for plaintiff: *T. H. Williams, for Evans, Manchester.*

Attorneys for defendants: *Reed, Phelps, & Sidgwick, for Sale & Co., Manchester.*

ELLIS *v.* M^c^CORMICK. 1869 *Feb.* 12.

Debtor and Creditor—Composition Deed—Requisite Assents in value—Secured Creditors—Bankruptcy Amendment Act, 1868 (31 *&* 32 *Vict. c.* 104), *s.* 3.

The 31 & 32 Vict. c. 104, s. 3, is not retrospective; and therefore a deed executed before that statute came into operation must, in order to be valid under s. 192 of the Bankruptcy Act, 1861, be assented to by three fourths in value of the creditors, taking into account the amount of secured as well as of unsecured debts.

RULE, calling on the plaintiff to shew cause why the writ of ca. sa. issued in this action should not be set aside, and all proceedings to execute the same stayed, unless the plaintiff obtain leave from the court of bankruptcy to execute the same, upon the ground that the defendant is protected from execution by virtue of the certificate of the court of bankruptcy of the registration of a deed dated the 30th of September, 1864.

From the affidavits on which the rule was moved, it appeared that the defendant was a large contractor for railway and other works, and he executed on the 7th of October, 1864, a deed, dated the 30th of September, 1864, under s. 192 of the Bankruptcy Act, 1861, by which he assigned all his property to trustees for the benefit of creditors. The deed was duly registered, and a certificate granted by the registrar of the bankruptcy court, on the 14th of October, 1864; and under this deed the trustees had ever since been carrying out the defendant's contracts for the benefit of his creditors, with the assistance of the defendant, whose presence was most material at the works going on at Hull Docks.

This action was commenced on the 4th of July, 1867, for a debt due before the execution of the deed, but the plaintiff had not assented to the deed, and, there being no clause of release, it could not be pleaded in bar. The action was compulsorily referred, and the plaintiff claiming over 1000*l.*, an award was made in April, 1868, for 674*l.*, and the costs having been taxed at 112*l.*, judgment was signed on the 11th of May, and a ca. sa. issued; and from the statement of the plaintiff's attorney in answer to inquiries, it was apprehended that it was the intention of the plaintiff to

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cause the arrest of the defendant without obtaining the consent of the court of bankruptcy.

The affidavits filed on shewing cause disclosed that the requisite assents of creditors to the deed had been calculated as to value on the principle of excluding from the calculation the amount of *secured* debts, and if the secured debts were taken into account the requisite majority of three fourths in value had not assented to the deed. There was a clause in the deed by which it was "agreed and declared between the parties, that unless a majority in number, representing at least three fourths in value of the creditors of the defendant, whose debts respectively amount to 10*l.* and upwards, should execute the deed, or in writing assent thereto, or approve thereof, within twenty-eight days from the date thereof, then the deed, and every clause, matter, and thing, therein contained, should be completely void and of no effect."

Quain, Q.C., and *R. G. Williams*, shewed cause. The secured debts ought to have been taken into calculation: *Wittaker* v. *Lowe.* (1) The deed is therefore invalid under s. 192 of the Bankruptcy Act, 1861. The deed could not have been pleaded to the action, as it contains no release; but if it could have been pleaded, *Rossi* v. *Bailey* (2) shews that it must be pleaded and cannot afterwards be set up as a protection under s. 198. If the deed could have and had been pleaded, and owing to the want of the requisite assents it turned out invalid, it is clear it would have been no defence; so, if it turn out invalid, it can be no protection under s. 198: otherwise the defendant would be in a better position than a debtor who had a deed containing a release. If the deed is void, the plaintiff and the other creditors are remitted to their legal rights: *Ex parte Banfield.* (3) If there be any doubt what the effect of a certificate of registration of an invalid deed in general may be, the proviso of the present deed, that it is to be void unless the statutable assents be obtained, puts the matter beyond doubt, and the deed being void the certificate falls with it: *Baker* v. *Painter.* (4) *Ilderton* v. *Jewell* (5), and *Leigh* v. *Pendlebury* (6), are

(1) 35 L. J. (Ex.) 44; 4 H. & C. 109.
(2) Law Rep. 3 Q. B. 621.
(3) Law Rep. 1 Ch. App. 154.
(4) Law Rep. 2 C. P. 492.
(5) 32 L. J. (C.P.) 256; 14 C. B. (N.S.) 665.
(6) 33 L. J. (C.P.) 172; 15 C. B. (N.S.) 815.

distinct authorities that a certificate of an invalid deed is no protection; and these cases are not overruled by *Lloyd* v. *Harrison* (1), for that only decides that such a certificate justifies the sheriff in releasing the execution creditor from custody. (2) The certificate is not an absolute protection, but only against debts barred by the deed: *Dignam* v. *Baily* (3); and even assuming the debt to be barred, the costs are not: for this case is distinguishable from the late case of *Simpson* v. *Mirabita* (4), which overruled *Maughan* v. *Vinesberg* (5), inasmuch as in the present case the costs were incurred by the act of the defendant himself, and these costs could not have been proved under a bankruptcy, under 12 & 13 Vict. c. 106, s. 181, if the judgment were obtained after the bankruptcy.

W. G. Harrison, in support of the rule. No doubt, by the law as it must be taken to have been at the time the deed was executed, the assents were not sufficient; but 31 & 32 Vict. c. 104, s. 3 (6) has altered the law, and declared that the secured debts shall be excluded from the calculation; and that enactment must be construed as retrospective; there is nothing in it to confine its operation to deeds executed after the Act; and the rule as to excluding secured debts always obtained in bankruptcy. To hold the enactment retrospective will have the effect of upholding deeds such as the present, which would otherwise fall to the ground, and the trusts under which have for so long been carried out. If the defendant is not entitled to have the ca. sa. set

(1) Law Rep. 1 Q. B. 502.

(2) But in *Ames* v. *Colnaghi* (Law Rep. 3 C. P. 359), it was expressly held, as between the creditor and debtor, that a certificate of a deed under s. 192, although the deed was in fact invalid, was a protection to the debtor under s. 198, and that the certificate must be set aside by the court of bankruptcy, or leave granted to the creditor to avail himself of his execution.

(3) Law Rep. 3 Q. B. 178.

(4) Ante, p. 257.

(5) Law Rep. 3 C. P. 318.

(6) 31 & 32 Vict. c. 104, s. 3:—"No creditor shall be reckoned in the computation of the requisite majority in number representing three fourths in value of the creditors of the debtor executing such deed or instrument, unless he proves his debt by affidavit or declaration in the manner and subject to the provisions to be prescribed by general orders; and in the computation of the requisite value of such creditors, and for all other purposes of the deed, the amount due to each creditor, after deducting the value of the securities held by him on the debtor's property, shall alone be reckoned. . . ."

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aside, at least he is entitled to a stay of proceedings: *Ex parte Thatcher.* (1)

[MELLOR, J. The ca. sa. is regular; is there any instance in which the Court has interfered on the application of a defendant quia timet? (2)

Quain, contrà. The plaintiff purposely abstained from taking that point, being anxious to have the judgment of the Court as to the validity of the deed.]

By refusing this application, the protection intended by the statute is rendered incomplete. Even supposing the late statute not to be retrospective, and the deed therefore to be without the requisite assents, the Court will not allow its process to be abused, and the defendant by lying by so long has in effect acquiesced in the assignment for his and the other creditors' benefit; and in justice and equity he ought not now to be heard to say the deed is a nullity, and not binding upon him.

MELLOR, J. I think this rule must be discharged. I must say that if the point had been taken by the plaintiff's counsel, I most certainly should have been of opinion that we ought not to interfere at the present stage; it may be that the plaintiff may never execute the writ. This point it was desired to waive on the part of the plaintiff, and, although it is quite sufficient to discharge the rule, I think that in deference to the wish of the parties we may express our opinion on the validity of this deed, as we have no doubt upon the construction of the statute, protesting at the same time against this being taken as a precedent for the interference of the Court, when the application is merely quia timet. The question, then, whether the deed is valid or not, depends entirely on the intention of the legislature, to be gathered from the language of the late statute (31 & 32 Vict. c. 101), and I am of opinion that the clause applicable to this question is not retrospective. There is one clause (s. 11), which is retrospective; but then there are express words making it retrospective,—"under the recited Act or this Act." But there are no words in the 3rd, 4th, 5th, and 7th sections,

(1) Law Rep. 2 Ch. App. 93.

(2) In *Harding* v. *Inskip* (Law Rep. 4 Ex. 80), the Court of Exchequer refused to interfere on the ground that the defendant had not been arrested; and Pigott, B., in the principal case, had also refused an order at chambers on this ground.

strong enough to lead to the conclusion that it was intended that the enactments should operate retrospectively. And it requires such words in order to construe a statute to be retrospective contrary to the ordinary rule. Now s. 1 is clearly not retrospective, for it requires certain additional conditions to be observed on the part of the debtor, and it can only be intended to apply, although the words are general, to a deed made or entered into for the future. Then s. 3 applies to "such deeds," that is deeds already referred to, and as it is obvious it is for the future that the debt is to be verified by the affidavit of the assenting creditor, so it is for the future that the requisite value is to be computed after deducting the value of any securities held by creditors. Thus again, in s. 5, "any creditor of a debtor executing such deed," must mean executing for the future, for the legislature would surely have used other language had they intended to make the enactment apply to deeds already executed, as well as future deeds,—language such as is used in s. 11. Moreover, by s. 15, the statute is not to come into operation until the 11th of October, more than two months after it passed, and I cannot understand why, if the intention was that the Act should be retrospective, its operation should be deferred to a future time. I am therefore clearly of opinion that the Act was not intended to have a retrospective effect and to apply to deeds already made, but only to deeds in future.

HANNEN, J. I am of the same opinion. It is a well settled rule of construction that new legislation is not to be interpreted to apply to the past, unless such an intention is clear from the language used. Mr. Harrison says such is the language of s. 3, while he concedes that much of the statute can only apply to the future, and he says the reason of the thing is in favour of his construction, as it will tend to support deeds that otherwise must fail. But it seems to me that the legislature could never have intended that a change so great, in the rights of the different parties as they existed under the old law, should be introduced by language at the least so vague. Nor is the argument just that the retrospective construction would only have the effect of making some deeds valid, for it would in many instances have just the contrary effect. For these reasons it seems clear to me that it has not been made out

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that it was the intention of the legislature to enact retrospectively. This deed is therefore invalid by reason of its not having the requisite assents.

Rule discharged. (1)

Attorneys for plaintiff: *Neal & Philpot, for Clare, Liverpool.*
Attorneys for defendant: *Roy & Cartwright.*

Feb. 15.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF ST. MARY, CARDIFF, AND OTHERS, RESPONDENTS, *v.* THE RHYMNEY RAILWAY COMPANY, APPELLANTS.

Poor-Rate—Rateability of Occupier of Wharf for Wharfage Dues received by others.

The owners of docks and wharves let the wharves to a railway company. The company were the sole occupiers of the wharves, but by the agreement certain wharfage dues payable on all goods shipped or unshipped at the wharves were reserved to the landlords, and were paid direct to them by the owners or consignees of the goods :—

Held, that the railway company, as sole occupiers of the wharves, were liable to be assessed to the poor-rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of benefit which they themselves derived from the occupation.

APPEAL to the Glamorganshire Quarter Sessions, by the Rhymney Railway Company, against a poor-rate for the Parish of St. Mary, Cardiff, of the 27th of October, 1866, whereby the appellants were rated for their railway sidings, wharves, and tips, in the parish, on the gross estimated rental of 5960*l.* and the rateable value of 4304*l.*

1. The notice of appeal, stated amongst other things, that the trustees of the Marquis of Bute were assessed in the rate at lower sums than they ought to be charged with, and notice to that effect was given to the trustees.

2. At the hearing, the trustees, as well as the other respondents, the overseers of the parish, appeared, and the rate was confirmed subject to this case.

3. There is no dispute as to the sums of 3211*l.* gross rental, and 1584*l.* rateable value, forming part of the above-mentioned assessment, and such sums are admitted to be properly charged as the

(1) See note (2), ante, p. 273.

gross and rateable value of the railway sidings, wharves, and tips, occupied by the appellants in the parish, exclusive of certain rates or dues, the propriety of including which is the subject of appeal.

4. By the statutes 1 Wm. 4, c. cxxxiii., and 4 Wm. 4, c. xix., the late Marquis of Bute was empowered to construct a certain wet dock and other works at Cardiff, and such works were executed, and the dock which is called "The Bute West Dock" was built and opened for public use, and certain rates and dues for the use thereof were charged by authority of Parliament.

5. In the year 1852, the trustees of the present Marquis of Bute, to meet the requirements of the increasing trade of the port, commenced, as a private undertaking, and without any parliamentary sanction, the construction of another dock and proper wharf accommodation thereto, on the lands of the Marquis. This dock is called the "Bute East Dock" and was completed with the wharves belonging to it and opened for public use in the year 1856.

6. By agreement dated the 28th of February, 1855, and made in view of the completion of the Bute East Dock and works, the trustees of the Marquis of Bute agreed to grant a lease to the appellants, of the land necessary for the construction of a branch railway to the Bute East Dock, and the trustees agreed to complete four staiths for the shipment of coal upon the wharves adjacent to such dock, with sidings to connect such staiths with the branch railway, and to grant a lease of the wharves upon which such staiths and sidings should be erected, and of the staiths and sidings thereon, to the appellants; and the appellants agreed (so far as they should be able) to procure all the trade which they bring for shipment to the port of Cardiff to be shipped at the Bute Docks or the shipping places belonging to the trustees; and such trade was to be liable to the lockage and wharfage rates and dues for the time in force at the docks and shipping places, or either of them. The provisions of the agreement were to be embodied into a more formal instrument at the request of either of the parties thereto; but no such more formal instrument has been executed.

7. In pursuance of that agreement, the trustees completed the wharves, staiths, and railway sidings, and from that time the appellants have been in the sole occupation of the wharves, with the sidings and tips thereon. The trustees have been in the occupation

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of the dock adjoining to the wharves, namely, the Bute East Dock, since its completion in 1856.

8. The inconvenience of having the Bute West Dock regulated by parliamentary authority, and the Bute East Dock remaining a purely private undertaking, led to the obtaining by the trustees of the Act of 1865.

9. By section 59 of the Bute Docks Act, 1865 (28 & 29 Vict. c. cccxxv.), it is enacted as follows:—"From and after the commencement of this Act, the undertakers (the trustees) from time to time may demand and take for all goods specified in schedule 3 to this act annexed, which are shipped or unshipped, received or delivered, at, in, or upon, or from any part of the docks and works, or any lands of the undertakers, or which are discharged or received within or at any of the docks and works, from one vessel into another vessel, or into the waterway of any of the docks and works, any sum not exceeding the several wharfage rates in that schedule specified with respect to those goods respectively; and as regards all goods so shipped, unshipped, received, delivered, or discharged, which are not specified in that schedule, may demand and take in respect of the same wharfage rates equal to the wharfage rates from time to time payable in respect of goods so specified which are as nearly as may be of like nature, package, and quantity; and the wharfage rates shall be payable by the owners or consignees of the goods."

10. Before and since the passing of the Bute Docks Acts, 1865, the practice has been for the person who contracts with the appellants for the tipping of the coal, coke, and culm, to furnish to the trustees monthly accounts of the respective quantities thereof so shipped at the wharves and tips, and for the trustees to collect the rates or dues payable under the 59th section from the freighters or consignees in respect of such quantities, and to apply them to the purposes of their trust. And with respect to other goods shipped at the wharves, and which are not tipped, the accounts have been furnished directly to the trustees by the owners of such goods, from whom the trustees have collected the rates or dues. The trustees also receive rates or dues under the same section on all goods transhipped from vessel to vessel in the docks.

11. The rates or dues included in the poor-rate appealed against

are the rates or dues paid in respect of all coal and other goods shipped and unshipped at the wharves, as stated in the last preceding paragraph. No part of the rates or dues paid in respect of goods transhipped from vessel to vessel is included in the rate.

12 and 13. It is admitted that the amount assessed against the appellants is a fair and proper sum, if the rates or dues mentioned in paragraph 11 are rightly charged against them as forming part of the value of property in their occupation.

14. The question for the opinion of the Court was, whether the appellants ought to have been rated in respect of the rates or dues, as mentioned in paragraph 11.

15. If the Court should be of opinion that the appellants were not so rateable, then the rate was to be amended by substituting the sum of 1584*l.* for the sum of 4304*l.* as the total rateable value of the railway, sidings, wharves, and tips, in the occupation of the appellants.

If the Court should be of opinion that the sum of 2720*l.*, being the difference between the sums of 4304*l.* and 1584*l.* and which is admitted to be a proper assessment for the rates or dues mentioned in paragraph 11, forms part of the rateable value of tenements in the occupation of the trustees, then the rate was to be amended by the insertion of the same as rateable value of property in the occupation of the trustees accordingly; but if the Court should be of opinion that such rates and dues were rightly taken into account as rateable value of the property so occupied by the appellants, then the rate was to be confirmed.

Jan. 16. *Field, Q.C.*, and *Philbrick*, for the respondents. The appellants alone are in the occupation of the wharves, and they are the only persons who can be assessed to the rate. The overseers are entitled to rate the land at its full value, and the appellants cannot, by an arrangement with their landlords, escape their liability to be assessed at the amount at which the landlords, if in occupation, would have been assessed. *Frend* v. *Tolleshunt Knights* (1) shews that the trustees of the Marquis of Bute could not be rated for the wharfage dues; and *Lawrence* v. *Tolleshunt Knights* (2) is an authority that the appellants are rate-

(1) 1 E. & E. 753; 28 L. J. (M.C.) 169. (2) 2 B. & S. 533; 31 L. J. (M.C.) 148.

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able. *Reg.* v. *Thurlstone* (1) presents some difficulty to the argument for the respondents. There it was held that the right of shooting being reserved to the landlord, the tenant was not rateable in respect of the value of the shooting. But that case may be explained on the ground that an incorporeal hereditament is not rateable: *Hilton* v. *Bowes* (2); and moreover the decision appears to have been doubted in *Reg.* v. *Battle Union.* (3)

[HANNEN, J. In *Rex* v. *Snowdon* (4) it was held that the occupier of a toll house was not rateable to the poor for the tolls taken there, but for the toll house only; and the reason for the decision appears to have been, that if the toll house had been pulled down he would nevertheless be entitled to receive the tolls.]

There the lessee did not occupy any portion of the soil. It is clear from *Jones* v. *Mersey Docks* (5) that, in order to support a rate, the occupation need not be beneficial to the occupier; it is sufficient if the property be capable of yielding a clear rent over and above the necessary outgoings. *Reg.* v. *Marquis of Salisbury* (6) is in favour of the respondents. The appellant there was held rateable in respect of tolls taken at a bridge, because he was occupier of the soil on which the bridge stood. *Roberts* v. *Aylesbury* (7) was decided on the same principle. When once it is established that a beneficial occupation may exist, the occupier is rateable in respect of whatever profit can be derived from the land, whether it is made or not: *Reg.* v. *Vange.* (8)

Bulwer, Q.C., H. G. Allen, and *T. Allen,* for the appellants. The appellants derive no benefit from the wharfage dues, which are not received even in the first instance by them. It is true that they are in occupation of the wharves, but they are liable to be assessed only in respect of their beneficial occupation. *Lewis* v. *Swansea* (9) is in the appellants' favour. There the corporation of Swansea were held not to be rateable in respect of tolls and dues taken at quays the soil of which was vested in the corporation. The wharfage dues taken by the trustees confer no benefit upon

(1) 1 E. & E. 502; 28 L. J. (M.C.) 106. 5 Jur. N.S. 920
(2) Law Rep. 1 Q. B. 359.
(3) Law Rep. 2 Q. B. 8.
(4) 4 B. & Ad. 713.
(5) 11 H. L. C. 443; 35 L. J. (M.C.) 1. 11 Jur. N.S. 746
(6) 8 A. & E. 716.
(7) 1 E. & B. 423; 22 L. J. (M.C.) 34. 17 Jur. 236
(8) 3 Q. B. 242.
(9) 5 E. & B. 508; 25 L. J. (M.C.) 33. 1 Jur. N.S. 1108

the appellants; and in *Mayor of Lincoln* v. *Holmes Common* (1), the corporation of Lincoln were held not rateable in respect of land which yielded them no profit. *Reg.* v. *Fletton* (2) establishes that the occupier of land is rateable at the amount of profit actually derived therefrom, whether it is greater or less than the real value: in that case the amount of profit derived from the land was greater than the real value. In this case the amount of profit is less, but the same principle must be applied. The Court cannot decide in favour of the appellants without overruling *Reg.* v. *Thurlstone* (3), which is directly in point. A tenant can only hire what his landlord is willing to let. In the present case the soil only of the wharves is let to the appellants for a special purpose, but the dues which the trustees, and the trustees alone, are authorized by their act of 1865 to levy, are not included in the demise. If the parish suffers any hardship by this, the legislature alone can apply the remedy. As the law stands, a poor-rate is not a charge upon land, but on the occupier in respect of the profit of his occupation, and the test is, what would a tenant give for the tenement as the person rated has it? Applying this test the appellants are entitled to judgment.

Cur. adv. vult.

Feb. 15. The judgment of the Court (Cockburn, C.J., Mellor, Hannen, and Hayes, JJ.) was delivered by

MELLOR, J. The question raised and argued in this case was whether the appellants, the Rhymney Railway Company, as occupiers of the wharves, are liable to be rated in respect of the wharfage rates or dues paid for coal and other goods shipped and unshipped at the wharves occupied by the appellants, and we are of opinion that they are liable to be so rated.

These wharfage rates or dues are perfectly distinct from the rates or dues payable in respect of vessels passing into or out of the docks. The latter dues are in no way connected with the use of the wharves; while the wharfage dues included in the present rate are payable for the use of the wharves only, and are in no way connected with the use of the docks. The

(1) Law Rep. 2 Q. B. 482.
(2) 30 L. J. (M.C.) 89; 3 E. & E. 450.
(3) 1 E. & E. 502; 28 L. J. (M.C.) 106.

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dock dues therefore enhance the value of the docks, which are in the occupation of the trustees of the Marquis of Bute; and the wharfage dues enhance the value of the wharves in respect of the use of which they are payable, and which are stated in the special case to be in the sole occupation of the appellants. Primâ facie, therefore, it would seem that, as the trustees, as occupiers of the docks, would be rateable in respect of the dock dues, so the appellants, as occupiers of the wharves, would in like manner be rateable in respect of the wharfage dues.

But it was contended on behalf of the appellants that they were not so rateable on the ground that, although the wharfage dues arose from the use of the wharves which were occupied by the appellants, yet they were not received by the appellants, but by the trustees of the Marquis of Bute, on their own account; and that as the appellants did not, and could not, derive any benefit from these dues, they could not in any way be considered as enhancing the rateable value of the appellants' occupation.

The argument in substance comes to this, that the appellants are not liable to be rated in respect of the entire value of the land occupied by them, but only to the extent of the beneficial interest which they derive from such occupation.

It is clear that no rate in respect of these wharfage dues could be imposed on the trustees of the Marquis of Bute, who are occupiers of the docks only, and not of the wharves; and therefore, unless the appellants were liable to be rated in respect of the increased value of the wharves arising from these wharfage dues, the parish would be wholly deprived of any rate in respect of a very considerable part of the true value of the wharves. If the trustees had made no demise of the wharves, but had themselves remained in possession of them, as well as in receipt of the wharfage dues, they would have been rateable in respect of the entire value of the wharves, taking into account the dues in question. So if the trustees had included in their demise to the appellants the right of receiving the wharfage dues, the appellants, even though liable to pay an increased rent equal to the amount of the dues, would in like manner have been rateable for the entire value of the wharves as enhanced by the dues. And it would appear very unreasonable and unjust that by an arrangement between the

parties like that which exists in this case, and whereby the trustees give to the appellants the sole right of occupation, but reserve to themselves the right of receiving the dues, which form in substance a large part of the profits and value of the occupation, they should be able to exempt this part from all rateability.

We are of opinion that no such consequence will follow, and that the appellants, as sole occupiers of the wharves, are liable to be rated in respect of the full rateable value of the premises in their occupation, without regard to the precise amount of benefit which they themselves derive from such occupation. We consider the principle to be involved in the decision of the *Mersey Dock Cases* (1), and it is very distinctly stated in the judgments pronounced by the noble and learned Lords who took part in the decision of those cases. We had occasion to refer to this decision, and to act upon it, in the recent case of *Reg.* v. *Sherford* (2), which has a very close application to the present case. In that case the incumbent of three united parishes claimed to deduct from the assessment upon him for his tithe rent-charge the salaries necessarily paid by him to two curates, and which, pro tanto, diminished his beneficial interest in the rent-charge; but such a deduction, although sanctioned by a prior decision in the *Hackney Case* (3), was disallowed by this Court upon the authority of the *Mersey Docks Cases* (1), and we then pointed out the fallacy of confounding the *rateable value of the property occupied with the remunerative value to the particular occupier.* It is true that in that case the incumbent received the amount of the rent-charge, and in that respect it is distinguishable from the present, but that fact can make no difference to the parish. The wharfage dues arise from the use of the land of which the appellants are the sole occupiers, and would, but for the arrangement between them and the trustees of the Marquis of Bute, greatly enhance the remunerative value to them. That arrangement may be improvident as regards their own interest, but does not render the wharves themselves of less value. The decision of this Court in *Lawrence* v. *Tolleshunt Knights* (4) is substantially in accordance with *Reg.* v. *Sherford* (2), and illus-

(1) 11 H. L. C. 443; 35 L. J. (M.C.) 1.
(2) Law Rep. 2 Q. B. 503.
(3) E. B. & E. 1; 27 L. J. (M.C.) 233.
(4) 2 B. & S. 533; 31 L. J. (M.C.) 148.

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trates the same principle. The several recent decisions, as to including or excluding the value of the right of shooting game, in rating the land on which such right was exercised, were referred to and relied on by the appellants; but these decisions are in some respects distinguishable from the present case, and they appear not wholly consistent with each other. In *Hilton* v. *Bowes* (1) the right to the game had been severed by statute from the ownership of the land, and converted into a distinct incorporeal hereditament, which, of course, was not rateable. The case of *Reg.* v. *Thurlstone* (2), in which the value of game reserved was deducted from the rate on the occupier of the land, has been considered as of somewhat doubtful authority; and the last decided case of *Reg.* v. *Battle Union* (3), in which the owner and occupier of land, who let the right of sporting to another, who enjoyed it, was held rateable for the entire value of land and game, is quite consistent with our present decision. With respect to the case of the *Mayor of Lincoln* v. *Holmes Common* (4), which was relied on by the appellants, it appears to be quite distinguishable from the present, on the ground that the interest of the corporation, which was the mere ownership of the soil, was rendered absolutely worthless, and deprived of all rateable value, by the existence of the rights of stocking preserved to the freemen of Lincoln by the Municipal Act, and which were in the nature of incorporeal rights. In the present case the land for which the appellants are rated is of large rateable value, but by arrangement between the appellants and the trustees the latter are enabled to receive a considerable part of the property arising from the occupation. And we consider that in such a case the rate for the entire value, including the wharfage dues, is justly made upon the appellants, who are in the sole occupation of the land, and, consequently, are the only parties liable to be rated.

We therefore consider that the rate appealed against ought to be confirmed.

Rule discharged.

Attorney for appellants: *Roy.*

Attorneys for respondents: *Cunliffe & Beaumont.*

(1) Law Rep. 1 Q. B. 359.
(2) 1 E. & E. 502; 28 L. J. (M. C.) 106.
(3) Law Rep. 2 Q. B. 8.
(4) Law Rep. 2 Q. B. 482.

THE QUEEN *v.* MASTER AND OTHERS, JUSTICES OF GLOUCESTERSHIRE. 1869 *Jan.* 29.

Bankrupt—Order of Discharge—Process—Overseer of Poor—Poor-law Auditor, Proceedings by, against Overseers—4 & 5 *Wm.* 4, *c.* 76, *s.* 99—7 & 8 *Vict. c.* 101, *s.* 32.

By 7 & 8 Vict. c. 101, s. 32, the poor-law auditor is to certify on every account audited by him any money found to be due from any person, and such person shall pay over such money to the treasurer of the union within seven days, and if it be not so paid, the auditor is to proceed to enforce the payment of the money, which is to be recoverable in the same manner as penalties may be recovered under 4 & 5 Wm. 4, c. 76. By s. 99 of that Act, all penalties inflicted by the Act for any offence against the same shall, upon conviction of the offence, be levied by distress and sale of the goods of the offender or person liable by warrant of justices, and, in default of sufficient distress, the justices may commit the offender to prison for any time not exceeding three months unless the penalties be sooner paid.

An auditor on the 14th of April certified a balance to be due from the late overseer of a parish, and on the 5th of May laid an information against him for the nonpayment. At the hearing on the 18th of May, the overseer proved an order of discharge dated the 11th of May, on an adjudication of bankruptcy dated the 4th of January, and relied on it as a bar to the proceedings:—

Held, that the balance was a debt only, and the mode given for enforcing it did not make the nonpayment an offence; and the debt being proveable under the bankruptcy, and therefore barred by the order of discharge, no proceedings could be taken to enforce it.

Quære, whether the power of commitment in default of sufficient distress applies to such a case, or only to things which are expressly made "offences."

RULE, calling upon T. W. C. Master, and two other justices of Gloucestershire, and William James, to shew cause why the justices should not issue a warrant to commit James to prison for a term not exceeding three calendar months.

The auditor of the Wilts and Gloucestershire audit district certified in the receipt and payment book of the union on the 14th of April, 1868, a balance of 82*l.* to be due from William James, late overseer of the parish of Ampney Crucis (1); and the same

(1) 7 & 8 Vict. c. 101, s. 32, after giving power to form districts and appoint auditors, "and every auditor appointed for such a district shall have full powers to examine, audit, allow, or disallow of accounts and of items therein relating to moneys assessed for, and applicable to, the relief of the poor of all the parishes and unions within his district, and to all other moneys applicable to such relief; and such auditor shall charge in every account audited by him the amount of any deficiency or loss incurred by the negligence or misconduct of any person accounting, or of any sum for which any such person is account-

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not having been paid within seven days, on the 5th of May the auditor caused an information to be laid against James. On the hearing on the 18th of May, James proved that he had obtained, on the 11th of May, an order of discharge from the Bristol court of bankruptcy, on an adjudication dated the 4th of January, 1868; and he relied on the order as a bar to the proceedings. The justices declined to act without the sanction of the Court of Queen's Bench, and a rule was obtained calling on the justices and James to shew cause why the justices should not issue a distress warrant to enforce the payment of the 82*l*. This rule was made absolute on the 25th of November last, no cause being shewn. A distress

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able, but not brought by him into account against such person, and shall certify on the face of every account audited by him any money, books, deeds, papers, goods, or chattels found by him to be due from any person . . . and the person from whom any money is so certified to be due shall within seven days pay, or cause to be paid, such money to the treasurer of the guardians of the union or parish, if there be any such treasurer; . . . and if any such money, books, deeds, papers, goods, or chattels be not duly paid or delivered over, as hereinbefore directed, the said auditor, or any auditor subsequently appointed, shall proceed as soon as may be to enforce the payment or delivering over of the same; and all moneys so certified to be due by such auditor shall be recoverable as so certified from all or any of the persons making or authorizing the illegal payment, or otherwise answerable for such moneys, and shall be recovered on the application of such auditor, or any such auditor subsequently appointed, or by any person for the time being entitled or authorized to receive the same, in the same manner as penalties and forfeitures may be recovered under the provisions of the said first-recited act (4 & 5 Wm. 4, c. 76).

4 & 5 Wm. 4, c. 76, s. 99:—"All penalties and forfeitures by this act inflicted, or authorized to be imposed, for any offence against the same, shall, upon proof and conviction of the offences respectively before any two justices . . . be levied, together with the costs attending the information, summons, and conviction, by distress and sale of the goods and chattels of the offender, or person liable or ordered to pay the same respectively by warrant under the hands of the justices before whom the party may have been convicted, or, on proof of such conviction, by a warrant under the hands of any two justices acting for the county, &c. . . . but, if upon the return of such warrant, it shall appear that no sufficient distress can be had thereupon, then it shall be lawful for any such justices as aforesaid, as the case may be, and they are hereby authorized and required by warrant under their hands to cause such offender to be committed to the common gaol or house of correction of the county, riding, or place where the offender shall be or reside, there to remain without bail or mainprise for any term not exceeding three calendar months, unless such penalties and forfeitures, and all reasonable charges attending the same, shall be sooner paid and satisfied."

warrant was accordingly issued, and a return of nulla bona made on the 19th of December. On the 11th of January, after notice to James, an application was made to justices to commit James to prison, and he, as before, relied on his order of discharge in bankruptcy as a bar to the proceedings. The justices again refused to act without the sanction of the Court of Queen's Bench, as the former rule had been made absolute without argument. The present rule was then obtained.

Grantham shewed cause on behalf of the justices. (1) The balance certified by the auditor to be due from the overseer to the parish is a mere debt, and the fact that summary proceedings to enforce the payment may be taken under 7 & 8 Vict. c. 101, s. 32, and 4 & 5 Wm. 4, c. 76, s. 99, does not alter its character as a debt; it was, therefore, proveable under the bankruptcy, and the order of discharge under 24 & 25 Vict. c. 134, s. 161, barred it, and no proceedings can be taken for the nonpayment: *Rex* v. *Tucker*. (2) *Bancroft* v. *Mitchell* (3) will be relied on by the other side, but there the process, which was held to be of a criminal nature, was for the disobedience of an order of justices. The present is simply the case of the nonpayment of a debt certified to be due by a particular officer, the nonpayment of that is no offence unless expressly made so; the balance due is a mere civil debt, the proceedings to enforce which are barred by the bankrupt laws; just as in the case of *Rex* v. *Edwards* (4), it was held that an attorney was discharged by his certificate in bankruptcy, when in custody under an attachment for not paying money pursuant to a rule of court.

THE COURT then called upon

Jelf, in support of the rule. This is not like a mere private debt: it is a debt due from a public official in respect of money received and not paid over to the parish, and the nonpayment may well be treated as a criminal offence. The language of s. 32 fully bears out this. The auditor is to proceed to "enforce" the payment in the same way as penalties under 4 & 5 Wm. 4, c. 76, s. 99, which is by distress on the goods, and, in default, by imprisonment of the "offender."

(1) The overseer did not appear.
(2) 5 M. & S. 508.
(3) Law Rep. 2 Q. B. 549.
(4) 9 B. & C. 652.

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[MELLOR, J. That is, because the section is enacting how penalties for offences under the act shall be recovered. It is quite sufficient for the purposes of s. 32 if the power of distress and sale, which is appropriate and strictly in the nature of a civil remedy, be held alone applicable. The commitment is more in the nature of punishment for the offence.

COCKBURN, C.J. There is no such magic in the word "enforce;" it is equally applicable to enforcing payment of a debt by civil process as to criminal process; and it may well be that the power to commit is not imported. The nonpayment by an overseer of the balance due to his parish is not one of the things made an offence by s. 97 of 4 & 5 Wm. 4, c. 76; and neither s. 47, which is practically repealed by s. 32 of 7 & 8 Vict. c. 101, nor s. 32 itself applies the word offence to the nonpayment of the balance, but simply makes it recoverable as penalties are recoverable under the former Act. And the fact that the debt is to be recovered in the same summary way as penalties, is not sufficient to convert the nonpayment into an offence.]

Rex v. *Tucker* (1) does not really touch this question. All that was decided there was that a balance due from an overseer was a debt proveable under the bankruptcy. In *Bancroft* v. *Mitchell* (2), it was held that the mere nonpayment of money towards the maintenance of a parent pursuant to an order of justices was in the nature of a criminal offence.

[MELLOR, J. The ground of that decision was, that the statute had imposed the duty, and so made the neglect to support a parent an offence.]

In Paley on Convictions, 5th ed. pp. 112, 113, it is said: "It may be, as a general rule, that every proceeding before a magistrate, where he has power to *convict*, in contradistinction to his power of making an order, is a criminal proceeding, whether the magistrate be authorized, in the first instance, to direct payment of a sum of money as a penalty, or at once to adjudge the defendant to be imprisoned; and it must be borne in mind that when a statute orders, enjoins, or prohibits an act, every disobedience is punishable at common law by indictment; in such cases, the addition of a penalty, to be recovered by summary conviction, can hardly pre-

(1) 5 M. & S. 503. (2) Law Rep. 2 Q. B. 549.

vent the proceeding in respect of the offence from being a criminal one." So here, if the overseer does not pay over the money, in contravention of the statute, he may be indicted.

[MELLOR, J. In *Bancroft* v. *Mitchell* (1), that an indictment would lie was said not to be the test whether the act was criminal or not.]

The nonpayment of this money is at least in the nature of a tort, and although it might be ground for an action of assumpsit, the order of discharge is no bar: 2 Griffith's Bankruptcy, p. 964.

COCKBURN, C.J. This matter is perfectly clear. The statute directs that the creditor shall proceed to enforce the payment of the money, if it be not paid within seven days after he has certified it to be due, and it is made recoverable in the same summary manner as penalties are recovered under the earlier Act; but these provisions do not convert the nonpayment of what is merely a debt into an offence. The summary proceedings, therefore, against the overseer, can only attach where there is a debt existing; but the intervening bankruptcy extinguished the debt, and the debt being gone no proceedings could be taken to enforce the payment.

MELLOR, J. I am entirely of the same opinion. The fallacy of Mr. Jelf's argument is in not distinguishing between the debt and the means of enforcing it, by the same summary proceedings as a penalty inflicted for an offence. No doubt the power of commitment is in the nature of punishment for an offence; but summary proceedings for enforcing what is merely a debt must be in the nature of civil, and not criminal, process. Here was a debt due from the bankrupt which he cannot pay by reason of his bankruptcy, and it would be strange that because the bankruptcy intervened, and so made him unable to pay, it is to be treated as a criminal matter.

HAYES, J. I quite agree. *Rex* v. *Tucker* (2) really decides this point. The Court disregarded Mr. Nolan's argument that this was an indictable matter, and so an offence in the overseer, and they decided that the balance in his hands was debitum in præsenti, although he might only be accountable in futuro, and consequently

(1) Law Rep. 2 Q. B. 549.

(2) 5 M. & S. 508.

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proveable and discharged by the bankruptcy; and it is clear that, if it be a debt, the nature of it cannot be altered simply by the summary remedy given to enforce it.

Rule discharged.

Attorneys in the case: *Peacock & Goddard, for Mullings, Elliott, & Co., Cirencester.*

Feb. 1.

THE QUEEN *v.* OLDHAM.

Municipal Borough—Town Councillor, Disqualification for—"Regular Minister of a Dissenting Congregation"—5 & 6 Wm. 4, c. 76, s. 28.

On a motion for a quo warranto information against a town councillor of a borough, on the ground that he was disqualified at the election in November, 1868, by 5 & 6 Wm. 4, c. 76, s. 28, as being "the regular minister of a dissenting congregation," it appeared that the defendant carried on business in the borough, and was a deacon of the Baptist church there, and he had been invited in September, 1867, by the members of an Independent chapel, in a village about ten miles from the borough, to be their minister, which invitation he refused; but he subsequently agreed to preach for them every Sunday, from the 25th of March to the 24th of June, 1868, and at the end of this time further agreed to continue to preach till the end of the year 1868:—

Held, that the defendant was not "the regular minister of a dissenting congregation" within s. 28; and was therefore not disqualified as town councillor.

RULE, calling on the defendant to shew cause why a quo warranto information should not issue against him, to shew by what right he exercised the office of town councillor of the municipal borough of Wallingford.

The affidavits on which the rule was obtained stated that the defendant was elected town councillor in November, 1868, and that at that time he was the regular minister of the chapel of Independents at Pangbourne, and was not engaged in any other occupation, trade, or profession, having been elected to the pulpit in the month of December, 1867, for the period of twelve months, and at the expiration of this time was re-elected for the further period of twelve months.

The rule was granted on the ground, that the defendant was disqualified for election by 5 & 6 Wm. 4, c. 76, s. 28, which enacts "that no person being in holy orders, or being the regular minister of any dissenting congregation, shall be qualified to be elected or be a councillor or alderman of any borough."

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From the affidavits filed on shewing cause, it appeared that the defendant had carried on business for several years at Wallingford. He was a member and deacon of the Baptist church in the borough, and had been in the habit of preaching in the neighbouring villages; amongst others, at Pangbourne, about ten miles distant. In September, 1867, he was invited by the members of the Independent Church at Pangbourne, where he had occasionally preached, to be their minister, as it was known that he was about to give up business, and had some property and could support himself independently of the very small sum they could give as a salary. He refused their request; but subsequently agreed to preach for them every Sunday from the 25th of March to the 24th of June, 1868; and at the expiration of that time, he agreed to continue to preach for them till the end of the year 1868. He continued to carry on business at Wallingford till the 1st of September, 1868; and he resided at Wallingford, and went on the Sunday mornings to Pangbourne, and returned in the evening.

On the 29th of December, 1868, a resolution was passed by the congregation at Pangbourne, requesting the defendant to continue to conduct the services for the year 1869, with a view to a subsequent appointment; but it was discovered by reference to the terms of the trust deed of the chapel, that the minister must be an Independent Pædobaptist (which the defendant was not), and on the 7th of June, 1869, a resolution was passed that, finding they could not invite the defendant to become their regular permanent minister, they requested him to conduct the services at Pangbourne chapel until they could meet with a suitable permanent minister.

Thesiger shewed cause. The 28th section is a disqualifying section, and it must be construed strictly. It is clear that the defendant was not, at the time of the election, the regular minister of a dissenting congregation. The congregation of Pangbourne, at the end of 1868, were about to appoint him their regular minister when the discovery of the terms of the trust deed prevented it. This shews that the position of the defendant previously was not that of "regular" minister.

Francis, in support of the rule. The word "regular" is used in

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contradistinction to "occasional." The defendant was the regular minister of the congregation of Pangbourne, inasmuch as he performed the duty on Sundays regularly for a long series of months, and not merely occasionally in the absence of the regular minister. The defendant had latterly given up his business and devoted himself to the duty regularly.

BLACKBURN, J. I am of opinion that the rule must be discharged. Section 28 speaks of a "regular minister," not merely a minister as a clergyman, but regular minister, in an analogous position to a beneficed clergyman. The statement in the affidavits on which the rule was obtained was, that the defendant was de facto the regular minister of a dissenting congregation, and this called for an answer; and is, I think, answered by the affidavits in reply. I attach no weight to the statements as to the breach of the trust deed. It appears that the defendant had been asked in September, 1867, to become the minister of the congregation at Pangbourne, and had refused; but he had subsequently preached every Sunday from the 25th of March to the 24th of June, in 1868, and had afterwards agreed to do so for the rest of the year. If a salary had been shewn to have been received, or if there had been anything in the nature of a contract, that would have gone far to shew that he was the regular minister; but as it is, I think there is nothing to shew this, so as to call upon us to allow an information to be filed, on the ground that at the time of the election he was disqualified.

MELLOR, J. I am of the same opinion. It appears to me that the legislature had an object in view in using the word "regular," and that the disqualification was not intended to apply to a person occasionally preaching, but to a person who is appointed to be the minister of a particular congregation, and not merely asked temporarily to hold the office. In the present case it appears from the terms of the trust deed that it was necessary, for a formal appointment of the regular minister, that he should hold particular doctrines, and the defendant's doctrines were not such as would enable him to take the appointment. There was nothing more than a temporary invitation, not an appointment or contract; it does not appear that any salary was paid, though probably the defend-

ant received a present from the congregation. Under these circumstances, I do not think there is any ground for saying that the defendant was disqualified as the regular minister of a dissenting congregation.

HAYES, J. I quite agree. At the time of this election the congregation at Pangbourne had no regular minister; the defendant only agreed temporarily to supply the place until they could get a permanent minister. He was therefore not the regular minister.

Rule discharged.

Attorneys for relator: *Child & Son.*
Attorney for defendant: *John Bennett.*

[IN THE EXCHEQUER CHAMBER.]

Feb. 3.

MORTON AND OTHERS *v.* WOODS AND OTHERS.

Landlord and Tenant—Effect of Mortgage not executed by Mortgagee with Attornment by Mortgagor as Tenant—Estoppel—Construction of Mortgage Deed.

B., being mortgagor in possession, executed a mortgage on the 12th of September, 1866, of the premises to the defendants to secure the repayment with interest of certain advances to be made by the defendants. The mortgage was by indenture between B. and the defendants, but was never executed by the defendants; the deed recited the previous mortgage (which was in fee), and by it B. conveyed all the premises comprised in the recited mortgage to the defendants, in fee, upon trust that the defendants should, either immediately or at any time, sell them, "and as a further security for the principal and interest for the time being due from B. to the defendants, B. did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof, of such of the premises thereby conveyed as were in his occupation, for and during the term of ten years, if that security should so long continue, at the yearly rent of 800*l.*, to be paid on the 1st of October, the first yearly rent to be payable on the 1st of October then next. Provided that, notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, before or after the execution of the trusts of sale, to enter upon the said mortgaged premises, or any part thereof, and to eject B. or any person claiming through him, and to determine the said term of ten years, notwithstanding any lease that might have been granted by B." The defendants made the stipulated advances, and B. continued in occupation of the premises; and on the 15th of October, 1866, the defendants distrained for the first year's rent:—

Held (affirming the judgment of the Courtof Queen's Bench), that the intention

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of the parties, as evidenced by the deed, was to create a tenancy at will only, and not a term of ten years; that a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the defendants had not executed the deed was immaterial. Secondly, that, the parties having agreed that the relation of landlord and tenant should be established between them, the mortgagor was estopped from setting up that the defendants had no legal reversion; and that it made no difference that the fact of the mortgagor having only the equity of redemption appeared on the face of the deed; and that the distress was therefore lawful.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendants, on a case stated without pleadings. (1)

1. This is an action brought by the plaintiffs against the defendants for the recovery of 939*l.* 11*s.* 2*d.* damages for the seizure under a distress warrant of certain chattels alleged by the plaintiffs to be their property, as creditors' assignees, of the estate and effects of John Brown, junior, a bankrupt.

2. By his last will, dated the 10th of March, 1864, John Brown, senior, who died on the 30th of March, 1864, devised all his real and personal estate unto his sons, Lancelot Brown and John Brown, junior, and one William Henry Jolly, their heirs, executors, administrators, and assigns, upon certain trusts in the will mentioned.

3. Lancelot Brown died on the 7th of September, 1866, leaving his two co-trustees still surviving.

4. The said devise includes certain hereditaments situate at South Hylton, hereafter called the "Rivet Manufactory," which is the only portion of the testator's real estate to which this case refers, and which rivet manufactory was, on the 12th of September, 1866, and thence until the date of his bankruptcy, in the occupation of Brown.

5. Brown was, prior to and at the date of the mortgage to Frederick Horn, dated the 30th of May, 1865, hereafter mentioned, seised in fee of certain other hereditaments, also situate at South Hylton, called the "Rolling Mills," which were, on the 12th of September, 1866, and thence until his bankruptcy, in the occupation of Brown.

6. By indenture, dated the 30th of May, 1865, and made between Brown of the first part, the said Lancelot Brown of the second

(1) Law Rep. 3 Q. B. 658.

part, and the said Frederick Horn of the third part, in consideration of 1500*l.* to Brown by Frederick Horn then paid, Brown released and conveyed to Horn in fee a certain piece or parcel of ground in the indenture particularly described, including the rolling mills, to the use of Horn in fee, subject to a proviso for redemption, and with power of sale. Lancelot Brown joined in this deed only as security for his brother.

7. At the time of execution by Brown of the indenture of the 12th of September, 1866, hereafter mentioned, and for some time previously, he banked with the defendants, who are bankers carrying on business in co-partnership at Newcastle and Sunderland under the style or firm of "Woods & Co."

8. On the 8th of September, 1866, Brown, who was then indebted to the defendants, on the balance of his banking account, in a sum of about 1300*l.*, applied to the defendants to make him further advances to the extent of 1800*l.*, to enable him to carry on his business, which they agreed to do on the terms specified in the following memorandum, which he then signed and delivered to them:—"1866, September 8. Memorandum.—In consideration of Messrs. Woods & Co. this day agreeing to advance me to the extent of 1800*l.*, I agree to execute them a mortgage on my freehold land, rolling mills, machinery, fixtures, plants, and premises at South Hylton (subject to a present mortgage of 2500*l.*, to F. Horn, Esq.), and also on all my estate, share, and interest in the rivet manufactory near to the above premises, and on the entirety of the machinery therein, such to be for the securing the above advance and all moneys due or to become due from me to the said Messrs. Woods & Co., on my account with them, or on any bills of exchange, or on any other account whatsoever. Such mortgage to contain absolute powers of sale, and an attornment as tenant, at the rate of 800*l.* per annum, payable in advance, and all other usual clauses. Interest at the usual rate charged by the said Messrs. Woods & Co. This security to be a continuing security notwithstanding any change in the firm by death, change of partners, or otherwise."

9. After the memorandum was so signed and delivered, and before the execution of the indenture of the 12th of September, 1866, the defendants, in pursuance and on the faith of the terms of

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the memorandum, made further advances to Brown to the amount of 1649*l.* 10*s.*, or thereabouts, in part of the said sum of 1800*l.* so agreed to be advanced by them.

10. By indenture dated the 12th of September, 1866, and made between John Brown, junior, of the first part, and the defendants of the second part, after reciting the before-mentioned indenture of mortgage, dated the 30th of May, 1865, and an indenture of further charge to the said Frederick Horn of 1000*l.* upon the premises included in the last-mentioned mortgage, dated the 6th of July, 1866, and also reciting that the two several sums of 1500*l.* and 1000*l.* were still due on the recited securities, but all interest thereon respectively had been paid to the then last current day of payment, and also reciting that under the before-mentioned last will of John Brown, senior, the said John Brown, junior (subject as in the will was expressed), was entitled in fee to one undivided moiety of all the real estate devised by the said will, and including in such real estate the said rivet manufactory; and also reciting that part of the real estate of the testator devised by the said will (and which part included the said rivet manufactory) had by agreement and arrangement with the trustees and other parties beneficially interested in the will, been for some time and then was, in the exclusive possession of John Brown, junior, who then carried on the trade of a rivet manufacturer thereon, and that all the machinery and plant of every description on the said rivet manufactory, were the exclusive property of the said John Brown, junior, and also reciting that Brown, being then indebted to the defendants on balance of his banking account with them, had, in order to induce them to forbear from taking proceedings at law against him to recover such balance and to continue their dealings with him, contracted to give them such mortgage or security as thereinafter appearing, in consideration of the premises, and also in consideration of 10*s.* paid by the defendants to Brown: Brown did thereby appoint, grant, release, convey, and confirm to the defendants (amongst other things) first, all that piece of ground and hereditaments including the said rolling-mills, being the hereditaments comprised in and conveyed to the said Frederick Horn by the said indenture of mortgage of the 30th day of May, 1865; and, secondly, all that undivided moiety, and all other the

share, beneficial estate, and interest of Brown, of and in the said rivet manufactory, and all other the real estate devised by the will of the said testator, and also the entirety of the machinery, both fixed and moveable, and all engines, boilers, cranes, and other fixtures, articles, and plant in and upon the said rivet manufactory, then or thereafter to be in the occupation of Brown. To have and to hold the said land, hereditaments, puddling furnaces, rolling mills, machinery, manufactories, and all other the premises thereinbefore described, and thereby intended to be granted, assured, or otherwise conveyed with their appurtenances unto the defendants, their heirs, executors, administrators, and assigns, according to the different natures or tenures thereof respectively, upon trust, that they (the defendants) should either immediately, or at any time or times thereafter sell and absolutely dispose of the said several hereditaments and all other the premises thereinbefore described and granted, assured, or otherwise conveyed, and should apply the purchase-money to arise from such sale in manner therein mentioned; and as a further security for the principal and interest moneys for the time being due from Brown under or by virtue of the present indenture, Brown did thereby attorn and became tenant to the defendants, their heirs, and assigns, as and from the date thereof, of such of the said hereditaments and premises thereby granted or otherwise conveyed as was or were in his occupation for and during the term of ten years, if that security should so long continue, at and under the yearly rent of 800*l.*, to be paid yearly on every first day of October in every year, the first yearly rent to be paid and payable on the first day of October then next. Provided that notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, before or after the execution of the trusts of sale therein contained, to enter into and upon the said mortgaged premises, or any part thereof, and to eject the said John Brown, junior, and any tenant or person claiming or to claim under him therefrom, and to determine the said term of ten years, notwithstanding any lease or leases that might have been granted by Brown.

11. The indenture of the 12th of September, 1866 (the recitals of which are to be taken as true so far as the facts stated therein

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are not in this case shewn to have been varied), was executed by Brown on the day of the date thereof, but it was at the date of making the distress hereafter mentioned, and still is, unexecuted by or on behalf of the said Woods & Co., nor has it ever been registered as a bill of sale, or otherwise. The said indenture of the 12th of September, 1866, was executed by Brown, in pursuance of the said memorandum of the 8th of September, 1866, and on the execution thereof the defendants made him further advances, amounting, with the advances so made by them between the giving of the memorandum and the execution of the indenture, to a sum exceeding the said sum of 1800*l.* mentioned in the memorandum.

12. After his execution of the said indenture of the 12th of September, 1866, until and at the time of the making of the distress hereafter mentioned, Brown continued his exclusive occupation both of the rivet manufactory and of the rolling mills. In the beginning of October, 1866, Brown found himself in such pecuniary difficulties as to be unable to carry on his business any longer, and suspended payment.

13. On the 15th of October, 1866, the defendants, by their bailiff, distrained certain goods and chattels which at the time of such distress were on the rivet works and the rolling mills respectively for 800*l.*, being one year's rent, which under the indenture of the 12th of September, 1866, accrued due on the 1st of October, 1866. At the time when this distress was made there was due to the defendants from Brown, on the security of the said indenture, a sum considerably exceeding the sum for which the distress was made.

14 and 15. On the 25th of October, 1866, Brown filed a declaration of insolvency, and on the 23rd of November, 1866, he was adjudicated a bankrupt on a creditor's petition, and the plaintiffs have been appointed creditors' assignees under such bankruptcy.

16. The plaintiffs paid to the defendants the sum of 939*l.* 11*s.* 2*d.* for rent and costs of distress, under protest.

17. On payment of the said sum the defendants withdrew from possession of the distrained chattels, and the plaintiffs have since sold them.

The question for the opinion of the Court was, whether the distress made by the defendants was legal and valid.

The Court of Queen's Bench held that it was. (1)

Joshua Williams, Q.C. (with him *Manisty, Q.C.*), for the plaintiffs. The plaintiffs contend: First, that, on the terms of this mortgage deed, the parties did not intend to create a tenancy at will only, but an estate or term for ten years, determinable in a particular manner: that this term was not created, because by the Statute of Frauds a writing signed by the party creating the estate was necessary, and by 8 & 9 Vict. c. 106, s. 3, a deed would now be necessary, whereas the defendants did not execute the deed. Secondly, that there was no legal estate, by estoppel or otherwise, to support the distress. Thirdly, that the deed was an evasion of the Bills of Sale Act, 17 & 18 Vict. c. 36, s. 7, as a "licence to seize" the goods, and is therefore void for want of registration. First, the terms of the clause of attornment clearly create a tenancy for ten years, and the proviso as to the power of the mortgagees to enter and determine the term at any time, i.e., at the will of the lessors, must be rejected as repugnant. In Bac. Abr., tit. Leases and Terms for Years, (L) 3, vol. 4, p. 836 (7th ed.), it is laid down:—"If one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words void for the repugnancy, by Bro.;" and Bro. Ab., tit. Lease, par. 13, is cited for the proposition. If there were a tenancy at will only, this would determine on the death of the lessor: Co. Litt., 57 b.; but the attornment is to the mortgagees and their heirs; so again it would be determined by assignment: *Dinsdale* v. *Iles.* (2) See also *Newport's Case* (3), that by the assignment of a mortgage the mortgagor becomes tenant at sufferance. Again, the proviso for entry is inconsistent with a tenancy at will, for it contemplates the possibility of the tenant granting an underlease; but a tenant at will, by giving up possession, terminates the will. Any alienation of the lessee terminates the estate (Watkins' Conveyancing, p. 2), if known to the lessor: *Pinhorn* v. *Souster.* (4)

[CLEASBY, B. It would appear from *Blunden* v. *Baugh* (5) that,

(1) On the grounds stated in the head-note, ante, p. 293; see Law Rep. 3 Q. B. 658.

(2) 2 Lev. 88; 1 Vent. 247.

(3) Skin. 423.

(4) 8 Ex. 763; 22 L. J. (Ex.) 266.

(5) Cro. Car. 302.

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on alienation by a tenant at will, the lessor might treat it as a disseising or not, at his option.]

Again, a tenancy at will must be determinable at the will of either party, but here the tenancy is determinable by entry of lessor only. These reasons shew that it was intended to create a term of ten years, and, if so, this term was not created by reason of there being no deed executed by the lessors, and so the rent incident to, or reserved on the term, did not attach, and there can at all events be no distress.

[CLEASBY, B. By the express words of the Statute of Frauds, a lease for more than three years, if not in writing, shall create a tenancy at will.]

The 8 & 9 Vict. c. 106, s. 3, enacts that a lease required by law to be in writing shall be void at law unless by deed. Assuming, however, a tenancy at will to have been created, it is not a tenancy at will at the rent reserved on the term of ten years.

[CLEASBY, B. The mortgagor attorned at this rent.]

Not if the intention was to create a term of ten years. He attorned to the defendants as tenant for a term of ten years at that rent. *Swatman* v. *Ambler* (1), following *Pitman* v. *Woodbury* (2), shews that, inasmuch as the term did not pass, the lessee is not bound, as he did not get what he had stipulated for as the consideration for the reddendum of the rent. In *West* v. *Fritch* (3), Parke, B., says, "the deed not having been executed by the mortgagee, it cannot operate as a lease." But as the mortgagor had acted under it, and paid rent, the Court held that a tenancy at that rent was created.

[CHANNELL, B. Blackburn, J., points out that the payment of rent was not relied on by the Court, but simply the occupation. (4)]

In Cole on Ejectment, p. 450, it is laid down, that on entry of a tenant under a void lease, he becomes tenant at will, and if rent be paid, then a tenancy from year to year is created at the rent; and on a bare tenancy at will there can be no distress, as there is no rent reserved.

[BYLES, J. An attornment is quite as strong as payment of rent can be.]

(1) 8 Ex. 72; 22 L. J. (Ex.) 81.
(2) 3 Ex. 4.
(3) 18 L. J. (Ex.) 50; 3 Ex 216.
(4) See Law Rep. 3 Q. B. at p. 669.

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No doubt, if the attornment be as a tenant at will at the rent.

Secondly: The distress cannot be sustained for want of a legal reversion, as there was no express power given to distrain. There was here no legal reversion in fact, and none by estoppel, as the truth appeared: Co. Litt. 352 b. *Pargeter* v. *Harris* (1), is irreconcilable with the judgment of the Court below. In the judgment of the Court, it is said: "The declaration is not in the usual form in actions of covenant for rent; but it states, purposely, so much of the lease as shews that the plaintiffs had only the equity of redemption in the premises; and that the defendant knew that circumstance from the recitals in the lease. That recital is of itself sufficient to prevent either party being estopped from denying that the plaintiffs had a legal reversion; in truth, it estopped them from asserting it." That case is expressly recognized in *Cuthbertson* v. *Irving* (2), and the judgment of the Exchequer is adopted in the Exchequer Chamber. (3) So again, in *Saunders* v. *Merryweather* (4), it was held that the assignee of a lease when the title appeared on the assignment, was not estopped from taking advantage of the fact that the mortgagor had not the legal reversion, and so could not take advantage of a condition of re-entry: *Dancer* v. *Hastings* (5), and *Jolly* v. *Arbuthnot* (6), were much relied on in the Court below; but here the mortgagor was tenant of the rolling mills to Horn, and of the rivet manufactory to the trustees, under the will; and 11 Geo. 2, c. 19, s. 11, prevents the attornment to the defendants having any effect, which was not the case in the other two cases, as the statute excepts an attornment under a judicial order, as in *Dancer* v. *Hastings* (5), or with the assent of the lessor or the owner, as in *Jolly* v. *Arbuthnot* (6), for there the mortgagee assented to the attornment.

[BYLES, J. That statute only prevents a fraudulent attornment by a tenant to a stranger having any effect on the lessor's title or possession; but if Brown had paid the 800*l.* as rent to the

(1) 7 Q. B. 708, 727, 728.
(2) 4 H. & N. at p. 754; 28 L. J. (Ex.) at p. 308.
(3) 6 H. & N. 135; 29 L. J. (Ex.) 485.
(4) 3 H. & C. 902; 35 L. J. (Ex.) 115.
(5) 12 B. Moo. 34; 4 Bing. 2.
(6) 4 De G. & J. 224; 28 L. J. (Ch.) 547.

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defendants, surely he would have been estopped from denying their title, and the attornment must have the same effect as against him.]

There is another distinction, that in *Jolly* v. *Arbuthnot* (1), there was a power of distress expressly given; here there is no such power: if it had been intended that the defendants should be able to distrain, the power should have been expressed: *Evans* v. *Mathias* (2), cited in the Court below, is no authority in favour of the defendants.

Thirdly, if the Court holds that this deed did create a right to distrain, then it is an evasion of the Bills of Sale Act, 17 & 18 Vict. c. 36, and is void for non-registration; s. 7 extends a bill of sale to a "licence to take possession of personal chattels," and a power of distress would amount to that.

[CHANNELL, B. A power of distress is not such a licence, non constat that the owner may not replevy.]

Kemplay, for the defendants, was not called upon.

KELLY, C.B. The case in substance states that Brown being mortgagor in possession, executed in September, 1866, a second mortgage to the defendants which recited the previous mortgage in fee; and by it Brown mortgaged in fee to the defendants; and in addition, as a further security for the principal and interest due to the defendants, he attorned tenant to them, their heirs and assigns, for the term of ten years, at the yearly rent of 800*l*., the first rent to be paid on the 1st of October then next, with a power to the defendants, notwithstanding the term, to enter and take possession at any time. The defendants made the advances agreed upon, and Brown remained in possession; and on the 15th of October the defendants distrained for the first year's rent, pursuant to the clause of attornment. And the question to be decided is, whether this distress can be supported.

It has been contended on the part of the plaintiffs, first, that the defendants were not entitled by law to distrain, inasmuch as they had not the legal estate, and there was no legal reversion in them, and that rent and the power to distrain were only incident

(1) 4 De G. & J. 224; 28 L. J. (Ch.) 547. 5 Jur. N.S. 689

(2) 7 E. & B. 590; 26 L. J. (Q.B.) 309. 3 Jur. N.S. 793.

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to a legal reversion; and secondly, it was contended, that when the terms of the instrument are looked at, the relation of landlord and tenant did not subsist and was never created between the parties, on two grounds, first, that by the terms of the clause of attornment it appears that it was intended to create a tenancy for the term of ten years, and that, as the mortgage deed had not been executed by the defendants, the term was not created; and further, that the power of entry given to the defendants did not override the clause of attornment, or convert the term of ten years intended to be created into a tenancy at will. These objections are all of a technical nature; but we are bound to give effect to them, if they turn out to be sustained in point of law.

And first, as to the objection that the defendants, not having the legal estate, could have no right of distress. That they had not, in fact, the legal estate, is clear; but that may be said of all lessors, where there is a lease and a tenancy by estoppel, and where the lessors have frequently no title at all; here the defendants have an equitable title only, and the question becomes of primary importance, because it is only by estoppel that the defendants can be said to have the legal estate, and it is said that no estoppel arises where the truth appears upon the face of the instrument which is the evidence of the agreement between the parties; and it may be taken, as appears on the mortgage deed, that the defendants were not seised of the legal estate, but that it was in the first mortgagee, Mr. Horn. A number of cases bearing on this point have been cited; but when we come to look at the facts and the ratio decidendi of each, none of them are directly in point. They were either actions of covenant in which the covenant must be enforceable as an obligation at law, or actions of ejectment on a clause of re-entry, where it is perfectly clear there must be the legal estate in the plaintiff, and that if it is outstanding he cannot succeed. But even if any of the decisions or dicta were to lead to the conclusion that where the truth appears there can be no estoppel, that doctrine must be taken to be overruled by the case of *Jolly* v. *Arbuthnot* (1); and that, being the decision of the Lord Chancellor on appeal, is a decision of a court of co-ordinate jurisdiction, and we should be bound to defer to it. Now in that case we find there

(1) 4 De G. & J. 224; 28 L. J. (Ch.) 547.

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was a mortgage and an agreement by way of attornment, or a clause in the deed that a tenancy should exist between the mortgagor and a receiver appointed by the parties; and it is perfectly manifest that a mere receiver so appointed would have no legal, nor indeed equitable, estate in him, and his character of receiver and the absence of any interest in the estate appeared on the face of the deed. The Master of the Rolls, taking the view now maintained by the plaintiffs, held that the receiver had no right of distress by virtue of such a tenancy. (1) But Lord Chelmsford, C., reversed that decision, and held that the fact of the want of the legal reversion appearing on the face of the deed, by virtue of which the tenancy was created, did not do away with the tenancy or right of distress, which arose by intendment of law from the relation of landlord and tenant, or from the express agreement between the parties. He says:—"It is contended that the attornment to Aplin (the receiver) had no operation; not by agreement, because he had no interest in the land to which it could apply; nor by estoppel, because the deed sets forth the rights and interests of all parties, and shews that Aplin had no reversion in the premises to which the power of distress could be incident. It appears to me, however, that the circumstance of the truth of the case appearing upon the deed, is a reason why the agreement of the parties, which it embodies, should be carried out, either by giving effect to their intentions in the manner which they have prescribed, or by way of estoppel to prevent their denying the right to do the acts which they have authorized to be done." (2) His Lordship then refers to *Cornish* v. *Searell* (3), and *Dancer* v. *Hastings* (4), as supporting this view. There is undoubtedly this difference between *Jolly* v. *Arbuthnot* (5) and the present case, that the mortgagee was a party to the deed in that case, whereas the original mortgagee is not a party to the agreement in this; but it is the creation of the tenancy, or the estoppel, which arises from the creation of the relation of landlord and tenant by agreement between the parties, that makes the actual legal estate unnecessary to support the distress, and not

(1) See 28 L. J. (Ch.) 274.
(2) 4 De G. & J. at p. 237; 28 L. J. (Ch.) at p. 551.
(3) 8 B. & C. 471.
(4) 12 B. Moo. 34; 4 Bing. 2.
(5) 4 De G. & J. 224; 28 L. J. (Ch.) 547.

the consent of the third party in whom the legal estate is. Therefore the two cases are essentially identical, and if we had any doubt on the subject, which we have not, we should be bound by that authority; and we therefore hold that the right of distress, so far as this point of the want of the legal estate is concerned, is unaffected by the fact that such want of the estate appeared on the agreement by which the relation of landlord and tenant was created between the parties.

We next come to the objection arising from the terms of the instrument itself, and we have to consider whether any tenancy at all was created, and if a tenancy, whether a tenancy to which the right of distress was incident. The terms of the deed are as follows:—[The Lord Chief Baron read the clause of attornment and the proviso]. These clauses, it is said for the plaintiffs, shew an intention to create a term of ten years, if any tenancy at all, and the lease being by parol only, by reason of the non-execution of the mortgage deed by the mortgagees, the Statute of Frauds made the lease void. To this it may be answered, that the statute does not make the lease absolutely void, but only so far as to create a tenancy at will only. The effect of the statute I will consider hereafter, and I proceed to consider the terms of the instrument, upon which the judgment of the Court of Queen's Bench alone proceeded. Now, upon the terms of the deed it was contended by the plaintiffs, as I have already said, that it was the intention of the parties to create a tenancy for ten years, and that it would be contrary to this intention to hold that a tenancy at will only was created. In support of this proposition the great authority of Brooke's Abridgment, recognized and cited in Bacon's Abridgment, was cited: "That if one makes a lease for ten years at the will of the lessor, this is a good lease for ten years certain, and the last words are void for the repugnancy;" (1) and it is said: so here the attornment is for ten years, and the proviso that the landlord may enter and determine the tenancy at his pleasure, does not convert the term into a tenancy at will, but the proviso must be rejected as repugnant. It might be so in the ordinary case of a lease; but in order to ascertain whether such a rule of construction has any

(1) Bac. Ab. tit. Leases and Terms for Years, L. 3; (vol. 4, 836), citing Bro. Ab. tit. Lease, 13.

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application to the present instrument, we must take into consideration the whole scope and object of it. And when we find the main and indeed only object of the deed is a mortgage, and that the creation of a tenancy and the relation of landlord and tenant with a reservation of rent are intended as a mere security for the repayment of the mortgage money and interest, the authority cited is no longer applicable; and we must look at the whole instrument taken together in order to ascertain the intention of the parties. Now the parties may have contemplated that the relation of mortgagee and mortgagor, and of landlord and tenant, would, in all probability, or might at any rate, last for ten years, and accordingly a term of ten years is mentioned; but as the object of the relation of landlord and tenant is simply to secure a more speedy and ample remedy to the mortgagee, if his principal and interest be not repaid by regular instalments, a power is given to the mortgagee to enter at any time without notice; and it is clear from the proviso that, whatever was the nominal duration of the tenancy, it was intended that it should be in the power of the mortgagee at any time to put an end to it; in other words, the clause of attornment and proviso taken together created a tenancy at will, subject to the payment of the rent of 800*l.* as long as the mortgagor was allowed to remain in possession. We, therefore, are of opinion that the construction put by the Court of Queen's Bench on this instrument was perfectly right. It was said that this clause of attornment and the proviso were inconsistent with a tenancy at will, because a tenancy at will cannot be created so as to continue beyond the lives of the immediate parties. The whole law on this subject is based on very fine distinctions; but when we come to look at the cases, it would rather seem that a tenancy at will may continue to subsist after the death of one of the parties, unless the heir or legal representative shall do something to manifest his intention to determine the tenancy. At all events, it is enough to say that the mention of heirs and assigns does not necessarily manifest an intention to create anything more than a tenancy at will.

But even if there were any doubt upon the construction of this instrument, as to the intention to create a tenancy at will only, and if, as was contended on behalf of the plaintiffs, it be taken to

have been the intention to create a term of ten years, the operation of the statute puts an end to the question. For if it had been clearly intended to grant a lease of ten years, the lease being by parol only, by reason of the non-execution of the deed by the mortgagees, by the express words of the Statute of Frauds the lease is not absolutely void, but has the effect of a lease at will. From the execution of the deed, therefore, or on the attornment by the mortgagor, he became tenant at will to the defendants, and there being a rent of the specified amount of 800*l.* appearing on the face of the deed, a distress by them for that specific rent would be lawful. I do not, however, enter further into this point; it is sufficient for the decision of the case to say that we agree with the Court of Queen's Bench, that on the true construction of the instrument entered into between the parties, a tenancy at will was created. I say "between the parties," because although the deed was not executed by the defendants, there is ample evidence that its terms were assented to by the defendants, because on the execution by Brown, they proceeded to make the stipulated advances. A tenancy, therefore, was created between the parties, much in the same way as if letters had been written by Brown containing all the terms of this deed, including the contract to pay the 800*l.* rent, and the defendants had verbally expressed their assent to the terms. That would have been quite sufficient in law to create a tenancy at will between the parties at that rent, notwithstanding the statutes; and Brown having occupied and omitted to pay the rent at the time stipulated, the defendants became entitled to distrain.

As to the point made that this deed came within the Bills of Sales Act, we have no power to draw inferences of fact, and therefore we cannot say, as we might if we were sitting as a jury, whether the transaction is an evasion of the Act or not; and if we were to say, looking at the deed alone, that it was a bill of sale within the Act, we should hold in effect that wherever there was a mortgage including chattels with a power ultimately to take possession or distrain, that that was a bill of sale within the Act. But no such doctrine can be supported; consequently we hold that this point also fails, and we are unanimously of opinion that the judgment must be affirmed.

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CHANNELL and CLEASBY, BB., and BYLES and KEATING, JJ., concurred.

Judgment affirmed.

Attorney for plaintiffs: *J. W. Hickin, for Ralph Simey, Sunderland.*

Attorneys for defendants: *Young, Maples, & Co., for H. B. Wright, Sunderland.*

END OF HILARY TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

EASTER TERM, XXXII VICTORIA.

TAYLOR *v.* CHESTER.

1869
April 20.

Pledge—Bailment—Immoral Consideration—"In pari delicto potior est conditio possidentis."

The plaintiff deposited with the defendant the half of a 50*l.* bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note:—

Held, that the maxim, in pari delicto potior est conditio possidentis, applied, and that as the plaintiff could not recover without shewing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back.

9 Q.B. 478
14 Q.B.D. 29
74 Q.B.D. 357

THIS was an action to recover the half of a 50*l.* Bank of England note. The pleadings, facts, and course of the trial, are fully stated in the judgment of the Court.

Feb. 2. *Hopwood* (*Holker, Q.C.*, with him), for the defendant. It is a well-known maxim of law, "in pari delicto potior est con-

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ditio defendentis." If the whole contract contained in the pleadings were set out in a declaration, it would be quite clear that the plaintiff could not recover. In Chitty on Contracts, p. 579, 6th ed., it is stated: "Whenever the contract which a party seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect .... and the test as to whether a demand connected with an illegal transaction be capable of being enforced at law is, whether the plaintiff requires to rely on such transaction in order to establish his case." The contract is allowed to be impeached on grounds of public policy: *Holman* v. *Johnson.* (1) In Story's Equity Jurisprudence, s. 298, it is also laid down that where parties are concerned in illegal agreements or other transactions, whether they are mala prohibita or mala in se, courts of equity, following the rule of law as to participators in a common crime, will not interpose to grant any relief; acting upon the well-known maxim, "in pari delicto potior est conditio defendentis et possidentis." So in *Biggs* v. *Lawrence* (2) the plaintiffs could not recover for goods sold to the defendant where they knew that the goods were purchased to be smuggled, and they had packed them for that purpose. *Clugas* v. *Penaluna* (3) is to the same effect. The replication is no answer to the plea, and the judgment ought to be entered for the defendant on the whole record.

Feb. 3. *Herschell* (*Pope* with him), for the plaintiff. Even if, upon the demurrer, the replication is bad, the plaintiff is entitled to the verdict on the count on detinue. *Mason* v. *Fernell* (4) shews that if the defendant has a special property in the subject-matter of the action, he must plead it specially, and cannot rely on the pleas of non detinet and not possessed. The special plea does not set out the whole truth, and was not proved. If the defendant had pleaded the plea according to the truth, it would have been bad; the replication which was proved must be read with it. The jury have found the issue on the replication for the plaintiff, and he is entitled to have the verdict entered on it. But on the question as raised by the pleadings, it is not the plaintiff, but the defendant,

(1) Cowp. at p. 343.
(2) 3 T. R. 454.
(3) 4 T. R. 466.
(4) 12 M. & W. 674.

who relies upon the immorality. The plaintiff does not claim to succeed upon any contract, but on his right of property in the half-note. The cases which may be cited against the plaintiff are divisible into two classes—first, where it is sought to enforce an illegal contract; secondly, where the person from whom the illegal consideration has moved relies upon the illegality to recover back the money paid under the contract. But these cases do not apply, because here it is the defendant who, by means of an immoral contract, seeks to detain the note deposited.

[HANNEN, J. Parke, B., in *Scarfe* v. *Morgan* (1), says: "If an illegal contract is executed, and a property either special or general has passed thereby, the property must remain."]

That has never been decided; if it were law, the Court would have to go into all the circumstances of the illegal contract to see if the property had passed. If the plaintiff be right in his contention, it will be unnecessary for the Court to consider the question of illegality; and if it decides in his favour, they will not enforce the immoral contract; but if they decide in favour of the defendant, they will uphold an illegal agreement. If the contract to supply the plaintiff with the means to commit immorality be void, the deposit to procure the means is also void: *Cannan* v. *Bryce* (2); and on the same principle a covenant to pay for the price of land sold to the covenantor for an illegal purpose has been held not to be enforceable: *Bridges* v. *Fisher*. (3)

[MELLOR, J. It is well established by *Pearce* v. *Brooks* (4), and the cases there cited, that if a person makes a contract with the knowledge that another intends to apply its subject-matter to an immoral purpose, he cannot recover upon it.]

Those were all cases where the Court was asked to enforce the illegal contract.

[HANNEN, J. If a person lets a house for an immoral purpose, are his enforceable rights gone, so that he cannot bring ejectment? In this case a special property has passed to the defendant, and according to *Ferret* v. *Hill* (5), where an interest in realty has

(1) 4 M. & W. at p. 281.
(2) 3 B. & A. 179.
(3) 3 E. & B. 642; 23 L. J. (Q.B.) 276.
(4) Law Rep. 1 Ex. 213.
(5) 15 C. B. 207; 23 L. J. (C.P.) 185.

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passed, it cannot be avoided on the ground that it has been gained by a misrepresentation.]

The special property can only be given by the special contract, and the defendant must set up the special contract to detain the note. Suppose the plaintiff had tendered the amount for which the half-note was pledged, the defendant's lien would be at an end; could it then be argued that the plaintiff would not be entitled to recover the half-note?

Holker, Q.C., replied.

Cur. adv. vult.

April 20. The judgment of the Court (Mellor and Hannen, JJ.) was delivered by

MELLOR, J. In this case the plaintiff declared on the bailment of the half of a 50*l.* Bank of England note, to the defendant, to be redelivered on request, alleging a refusal by the defendant to redeliver such half-note. The second count was in detinue for the same half-note?

The defendant, after traversing the delivery and detention of the note, and to the second count denying that it was the property of the plaintiff, pleaded separately and specially to both counts, in effect, that the half-note in question had been deposited by the plaintiff with the defendant by way of pledge, to secure the repayment of money due and money then advanced by the defendant to the plaintiff and then due.

The plaintiff joined issue on the defendant's pleas, and also replied specially that the alleged debt or sum, in respect of which the defendant justified the non-delivery and detention of the half-note, was for wine and suppers, supplied by the defendant in a brothel and disorderly house kept by the defendant, for the purpose of being consumed there by the plaintiff and divers prostitutes in a debauch there, to incite them to riotous, disorderly, and immoral conduct, and for money knowingly lent for the purpose of being expended in riot and debauchery and immoral conduct.

The defendant rejoined, taking issue on the replication, and also demurred to its validity.

On the trial before me at Manchester, the case of the plaintiff was that the note had not been deposited at all with the defendant,

but had been fraudulently taken and appropriated by her. The jury, however, did not adopt his view of the facts, but found that the note was deposited by way of security, as alleged by the defendant, and they further found upon the evidence that the debt was incurred and the money advanced as alleged in the plaintiff's replication to the special pleas. On these findings, the verdict was entered for the defendant, with liberty to the plaintiff to move to enter the verdict for him for 50*l.*, to be reduced to nominal damages in case the note should be returned to the plaintiff.

A rule was accordingly obtained to enter the verdict for the plaintiff, on the ground that the jury had found all the issues tendered by the plaintiff in his favour.

This rule and the demurrer to the replication came on together for argument at the sittings in banco after last Hilary Term, before my Brother Hannen and myself, and at the close of the argument we took time to consider our judgment.

It was argued on the part of the defendant, in shewing cause against the rule, and in support of the demurrer to the special replication of the plaintiff, that, upon the finding of the jury and the facts as admitted by the demurrer, the plaintiff and defendant were in pari delicto, and that therefore upon the whole record judgment must be entered for the defendant. On the part of the plaintiff it was argued that it was the defendant who was relying on the illegal transaction as an answer to a claim of the plaintiff, founded on his ownership of the note, and his rights to recover back the same, and many startling consequences were pointed out to us as likely to result from a decision that the plaintiff could not recover. We have fully considered the case, and are satisfied that the plaintiff cannot recover under the circumstances found by the jury, and admitted on the record. The maxim that "in pari delicto potior est conditio possidentis," is as thoroughly settled as any proposition of law can be. It is a maxim of law, established, not for the benefit of plaintiffs or defendants, but is founded on the principles of public policy, which will not assist a plaintiff who has paid over money or handed over property in pursuance of an illegal or immoral contract, to recover it back, "for the courts will not assist an illegal transaction in any respect:" per Lord Ellenborough in

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Edgar v. *Fowler* (1); *Collins* v. *Blantern* (2); Lord Mansfield in *Holman* v. *Johnson.* (3)

The true test for determining whether or not the plaintiff and the defendant were in pari delicto, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party: *Simpson* v. *Bloss* (4), *Fivaz* v. *Nicholls.* (5) It is to be observed that in this case the illegality is not in a collateral matter, as in the case of *Ferret* v. *Hill* (6), which was cited for the plaintiff; but is the direct result of the transaction upon which the deposit of the half-note took place.

Mr. Herschell's argument was based upon the hypothesis that, in spite of the finding of the jury, the plaintiff was entitled to recover by virtue of his property in the half-note, and that it was the defendant alone who set up an immoral transaction as the answer to the plaintiff's claim.

This argument appears to us to be founded upon an entirely erroneous view of the facts. The plaintiff, no doubt, was the owner of the note, but he pledged it by way of security for the price of meat and drink provided for, and money advanced to, him by the defendant. Had the case rested there, and no pleading raised the question of illegality, a valid pledge would have been created, and a special property conferred upon the defendant in the half-note, and the plaintiff could only have recovered by showing payment or a tender of the amount due. In order to get rid of the defence arising from the plea, which set up an existing pledge of the half-note, the plaintiff had recourse to the special replication, in which he was obliged to set forth the immoral and illegal character of the contract upon which the half-note had been deposited. It was, therefore, impossible for him to recover except through the medium and by the aid of an illegal transaction to which he was himself a party. Under such circumstances, the maxim "in pari delicto potior est conditio possidentis," clearly applies, and is decisive of the case.

(1) 3 East, 222.
(2) 2 Wils. 341.
(3) Cowp. at p. 343.
(4) 7 Taunt. 246.
(5) 2 C. B. 501.
(6) 15 C. B. 207; 23 L. J. (C.P.) 185.

It would also appear from the case of *Scarfe* v. *Morgan* (1), per Parke, B., in delivering the judgment of the Court, that, notwithstanding the illegality of the transaction itself, out of which the deposit in this case arose, the lien would exist, because the contract was executed and the special property had passed by the delivery of the half-note to the defendant, and the maxim would apply "in pari delicto potior est conditio possidentis."

It is, however, sufficient in the present case to determine it on the ground that the plaintiff could not recover without shewing the true character of the deposit; and that being upon an illegal consideration, to which he was himself a party, he was precluded from obtaining "the assistance of the law" to recover it back. It is not necessary to consider what might have been the effect of a tender of the amount for which the note was pledged, and there is nothing to raise any such question in this case.

The result, therefore, will be that the verdict must stand for the defendant on the issues taken on the special pleas, and for the plaintiff on the issue taken on the replication; but as upon the whole record it is manifest that the plaintiff cannot recover, judgment will be entered for the defendant.

Judgment for the defendant.

Attorneys for plaintiff: *T. H. Williams, for A. T. H. Evans, Manchester.*

Attorneys for defendant: *Edwards, Layton, & Jaques.*

(1) 4 M. & W. at pp. 281, 282.

ASHWORTH, APPELLANT; HEYWORTH, RESPONDENT.

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April 21.

Markets and Fairs Clauses Act, 1847 (10 *Vict. c.* 14), *s.* 13—*Exposing Goods for Sale—"Dwelling Place or Shop."*

By s. 13 of the Markets and Fairs Clauses Act, 1847, after the market-place is opened for public use, every person, other than a licensed hawker, who shall sell, or expose for sale, in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are authorized to be taken in the market, is made liable to a penalty not exceeding 40*s.*

The appellant was the tenant of a dwelling house and shop, and a piece of ground in front of the shop, in the town of B.; there was a wooden shed affixed to the house, and supported on wooden posts, which had been erected over the piece of ground for eighteen years; and previous to the erection of the shed stone flags had been built into, and formed part of, the house, which projected three feet from the house, and these flags helped to support the wooden shed.

The appellant, after a market had been opened for the town, exposed potatoes and other vegetables for sale outside his house and shop, upon the piece of ground and beneath the wooden shed, and was convicted by justices on an information charging that he had contravened the above section. On a case stating the above facts:—

Held, by Cockburn, C.J., and Lush and Hayes, JJ. (Mellor, J., dissenting), that the facts shewed that the shed was part of the appellant's dwelling place or shop, and the justices were wrong in convicting him.

CASE stated under 20 & 21 Vict. c. 43, by Justices of Lancashire.

The appellant was charged upon an information laid by the respondent, being the inspector of nuisances to the Local Board for the district of Bacup: "for that he, the appellant, within six months then last past, to wit, on the 21st of March, 1868, at the township of Newchurch, did, after a market place had been duly opened for public use, and not being a licensed hawker, unlawfully expose for sale in a certain place, not being his own dwelling house or shop, to wit, in Yorkshire Street, within the prescribed limits of the Local Board for the district of Bacup, certain articles for which toll is authorized to be taken in the said market—to wit, onions, oranges, turnips, carrots, potatoes, and cresses."

The Local Government Act, 1858 (21 & 22 Vict. c. 98), was adopted in the town of Bacup in 1863, and in 1864, the local

board, acting under s. 50 (1), provided a market house for the purpose of holding markets, and the market house was duly declared open for public use on the 17th of August, 1867.

The appellant is tenant of a dwelling house and shop, and a piece of ground in front of the shop, all such premises being within the district. Up to the time of the opening of the market house, some of the inhabitants of the town had been in the habit of exposing their goods for sale outside their dwelling houses and shops, either upon the public footpaths, or upon ground attached to their dwelling-houses and shops. The occupiers of the house and shop now held by the appellant had, for upwards of forty years at least immediately preceding, and up to the time of laying the information, been in the habit of exposing for sale their various goods and commodities outside the dwelling house and shop, upon the piece of ground which was attached to the dwelling house and shop.

A wooden shed affixed to the house, and supported on wooden posts, had been erected and continued over the piece of ground for a period of at least eighteen years; and previous to the erection of the wooden shed there had been stone flags built into and forming part of the house, which projected three feet from the house; the flags still remain beneath, and assist in supporting the wooden shed, and were erected at the same time as the dwelling house and shop, which is one of the oldest buildings in the town, and has been erected upwards of 100 years.

On the day named in the information, the appellant exposed potatoes and other articles mentioned in the information, for sale outside his dwelling house and shop, but upon the piece of ground and beneath the wooden structure or shed. The potatoes were in baskets. The other articles were exposed upon moveable boards or shelves, and not in sacks or bags; and it was proved that the articles and things exposed for sale were taken into the shop each evening.

(1) By 21 & 22 Vict. c. 98, s. 50, the local board are empowered, inter alia, to provide a market place, and construct a market house. . . . . But no market or slaughterhouse shall be established in pursuance of this section so as to interfere with any rights, powers, or privileges of any person . . . without his consent; and the provisions of 10 Vict. c. 14, so far as they relate to markets, are incorporated.

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It was contended that the annual value of the appellant's dwelling-house, shop, and premises would be considerably lessened, if he were deprived of the privilege of exposing his goods outside in manner aforesaid.

The appellant had never consented to any interference with his rights, powers, or privileges (if any) by the local board.

It was contended, on behalf of the appellant: First. That the exposing goods for sale was, under the circumstances, a right, power, or privilege which could not be interfered with by the local board, without the consent of the appellant. Secondly. That the articles so exposed for sale were not articles in respect of which tolls were authorized to be taken by the local board in their market. Thirdly. That the piece of ground being the property and in the occupation of the appellant, was within the meaning of the word "dwelling place" in s. 13 of the Markets and Fairs Clauses Act, 1847 (10 Vict. c. 14), and therefore within the exception in that statute. (1)

The justices were of opinion: First. That the right, power, or privilege claimed was not a right, power, or privilege within the meaning of s. 50 of the Local Government Act, 1858. Secondly. That the articles exposed for sale (or some of them) were articles in respect of which tolls were authorized to be taken in the market. Thirdly. That the words "dwelling place or shop" in s. 13 of the Markets and Fairs Clauses Act, 1847, meant a dwelling place or shop in the popular sense of the terms; and that the appellant, by exposing goods for sale under the wooden structure, was guilty of the offence charged; and they convicted him in a penalty of 2*s.* 6*d.* and costs.

Crompton Hutton, for the appellant. This structure in which the vegetables were exposed for sale by the appellant, was part of his house or shop, and therefore was within the exception of s. 13 of 10 Vict. c. 14. In *Pope* v *Whalley* (2) the structure was really

(1) 10 Vict. c. 14, s. 13:—"After the market place is open for public use, every person, other than a licensed hawker, who shall sell or expose for sale in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are by the special Act authorized to be taken in the market, shall for every such offence be liable to a penalty not exceeding 40*s.*"

(2) 6 B. & S. 303; 34 L. J. (M.C.) 76.

no more than a moveable stall; here the shed is fixed to the house on the appellant's own land. [He also contended that the appellant was exercising a right within the meaning of the proviso in s. 50 of the 21 & 22 Vict. c. 98, citing *Ellis* v. *Mayor of Bridgnorth* (1), and that it did not appear that the goods were liable to tolls; as to which he referred to the bye-laws, which were made part of the case.] But the Court called upon

Quain, Q.C. (*J. Kay* with him), for the respondent, on the first point. *Pope* v. *Whalley* (2) shews that it is a question of fact for the justices whether or not any particular structure is a part of a shop, and the Court will not interfere unless it appear that the justices have proceeded on a wrong principle.

[COCKBURN, C.J. This shed is merely an accessory to the appellant's shop. He might have built out the walls of his shop on his land, instead of doing that he has the shop open in front, and exposes the vegetables for sale in the shed. The Market Act intended to prevent the nuisance of stalls to be erected, but did not intend to prevent owners of houses exposing their goods for sale in the front of their houses. The magistrates have, in effect, said that they considered themselves bound to understand the word "shop" in its narrowest sense; but it would be a monstrous injustice so to interpret it.

LUSH, J. The magistrates have put such an interpretation on the section as would prevent a butcher from hanging meat outside his shop.]

In *Pope* v. *Whalley* (2), Mellor, J., says that a "shop" implies something more than a place for selling, it means a place for storing also. Here the goods are removed from the shed inside the shop every night.

[COCKBURN, C.J. Goods are generally removed from the front of shops into the interior. A shop may be used for sale only, or for both sale and storing.]

COCKBURN, C.J. I think the magistrates took too narrow a view in holding, where a shed like this is used attached to a man's own house and shop, that because it is not actually and strictly within

(1) 15 C. B. (N. S.) 52; 32 L. J. (C.P.) 273. (2) 6 B. & S. at p. 313; 34 L. J. (M.C.) at p. 80.

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the walls of the house, the man is exposing goods for sale otherwise than in his house or shop.

MELLOR, J. I must confess that I cannot see my way to saying the justices were necessarily wrong. I cannot, as a matter of fact, say that the structure is part of the appellant's house or shop.

LUSH, J. I think I can clearly see that this shed was a shop or part of a shop. It was for every purpose part of his premises, which he regularly occupied and used for the purpose of his business.

HAYES, J. Section 13 was evidently shaped against itinerant persons—persons who take up their stand and expose goods for sale not on their own premises, and even these are excepted if they are licensed hawkers.

Judgment for the appellant.

Attorneys for appellant: *N. C. & C. Milne.*

Attorney for respondent: *Charles Barnard, for Wheeler & Deane, Blackburn.*

April 21.

THE QUEEN *v.* THE CAMBRIAN RAILWAY COMPANY.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), ss. 25, 35, 68—*Mandamus to take up Award—Return that the Land was not injuriously affected.*

6 QB 425

To a mandamus, reciting that the prosecutor's ferry had been injuriously affected by the works of a railway company, that the parties had proceeded by arbitration under the Lands Clauses Consolidation Act, that the umpire had made his award, and commanding the company to take up the award and furnish a copy to the prosecutor, the defendants returned that the prosecutor's ferry had not been injuriously affected by the defendants' works, within the meaning of the Act, and that the prosecutor was not under the Act entitled to compensation. On demurrer:—*Held*, a good return.

MANDAMUS, reciting that the defendants by several Acts of Parliament were empowered to make a certain railway, and that the prosecutor, Griffith Owen, claimed to be owner of an exclusive right of ferry over a certain river or estuary, and the defendants had built a railway bridge and a bridge for foot-passengers over

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the river or estuary, adjacent to the ferry; that the prosecutor, on the 3rd of May, 1867, sent a notice, under the Lands Clauses Consolidation Act, 1845, of his interest in the ferry, and that it had been injuriously affected by the defendants' works, and claiming 1700*l.* compensation; that the prosecutor appointed an arbitrator, and the defendants also appointed an arbitrator, but without prejudice to their right to dispute the claim. That the arbitrators appointed an umpire, and on the arbitrators failing to agree, it was agreed between the prosecutor and the defendants, that the umpire should proceed to determine the claim according to the provisions of the Lands Clauses Consolidation Act; that on the 4th of October, 1867, the defendants and the prosecutor attended before the umpire by their respective counsel and attorneys, and that it was agreed that the umpire should make his award on or before the 13th of December, 1867; that the umpire duly made his award. The writ then commanded the defendants to take up the award at their own expense, and furnish a copy to the prosecutor.

Return, that the exclusive ferry and the interest of the prosecutor therein, have not, nor has either of them, been injuriously affected by the defendants' works within the meaning of the Lands Clauses Consolidation Act, as alleged, and that the prosecutor was not and is not, under the provisions of the said Act, entitled to claim or recover compensation from the defendants.

Demurrer and joinder.

Morgan Lloyd, in support of the demurrer. It has been held very soon after the Act passed, that the proper mode of obtaining a copy of the award under s. 35 of the Lands Clauses Consolidation Act (8 Vict. c. 18), is to proceed by mandamus: *Reg.* v. *South Devon Railway Company.* (1) The answer now attempted by the return is bad; it was urged on shewing cause against the rule, and it was then said by the Court that the question, whether or not the prosecutor was entitled in law to compensation, could be raised in an action on the award; the same observation applies now.

[COCKBURN, C.J. Suppose the defendants, on this return, shew that it is not a case in which the prosecutor is entitled to any compensation within the meaning of the statute, so that the award

(1) 15 Q. B. 1043; 20 L. J. (Q.B.) 145.

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is a nullity, are they compelled to incur costs for no purpose? The prosecutor, by demurring, admits that the allegations in the return are true.]

But, if true, they are no answer after the defendants have gone before the arbitrator.

[COCKBURN, C.J. The writ itself alleges that they proceeded under protest.]

The protest amounts to nothing; it has been decided that the award does not determine the legal right, but only the quantum of compensation, if any is recoverable; so that the defendants, without any protest, could have afterwards disputed the right. The proper course was for the defendants to refuse to take any step in the matter, and then, on a mandamus to them to issue their warrant, the point whether the prosecutor was entitled to any compensation might have been raised.

[LUSH, J. The prosecutor chose to proceed by arbitration; and if the company had refused to appoint an arbitrator, the prosecutor might have proceeded ex parte, in which case the parties would have been in precisely the same position as at present. If it is conceded that a company may raise the legal question, whether the claimant's land, &c., has been injuriously affected at some stage or other, is it not competent to them to do so at the present stage, and so avoid the useless expense of taking up the award, and then leaving the prosecutor to bring his action?

COCKBURN, C.J. If the prosecutor succeeds on the traverse to the return, he will get a peremptory mandamus.]

No doubt. But that course is attended with this inconvenience, he may still have to bring an action on the award, to which the defendants can again set up the same defence, and the prosecutor may thus have to try the same question twice. All the steps having been regularly taken by both parties, the last step ought to be taken of taking up the award.

[COCKBURN, C.J. The claimant can take up the award.]

That is doubtful; the words of s. 35 are that the arbitrator shall deliver his award to the prosecutors, and they are at their own expense to furnish a copy to the other party. It is too late now for the defendants to say that the claimant is not entitled to any compensation.

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[LUSH, J. The prosecutor does not say that the defendants are estopped. If by their proceedings the defendants are estopped from raising this point, he should have raised the estoppel on the record.]

As a point of law on this record, the claimant may or may not be entitled to compensation.

[COCKBURN, C.J. It is admitted by the demurrer that he is not entitled.

LUSH, J. By s. 68, the very foundation of the jurisdiction to proceed by arbitration, or otherwise, is the fact that the claimant is "entitled" to compensation.]

There need not be a clear absolute right; a primâ facie case is sufficient. At all events, this question should be raised in an action on the award, according to the universal practice up to the present time.

McIntyre, for the defendants, was not heard.

COCKBURN, C.J. There must be judgment for the defendants.

LUSH and HANNEN, JJ., concurred.

Judgment for the defendants.

Attorney for prosecutor: *Charles Wilkin.*
Attorneys for defendants: *N. C. & C. Milne.*

April 21.

THE QUEEN, ON THE PROSECUTION OF THE OVERSEERS OF ST. MARY, CARDIFF, RESPONDENTS, *v.* THE GREAT WESTERN RAILWAY COMPANY, APPELLANTS.

Poor-rate—Valuation List—Appeal against Second Rate—Second Notice of Objection required under Union Assessment Committee Amendment Act, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.

By 27 & 28 Vict. c. 39, s. 1, it is enacted that before any appeal shall be heard by any sessions against a poor-rate, the appellant shall give twenty-one days notice, with the grounds, to the assessment committee: provided, that no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved by the committee, unless he shall have given the committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just.

The appellants, having been assessed to a poor-rate in conformity with a valua-

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tion list, gave notice to the committee of their objection to the list, but the committee refused to alter the list, and on appeal the rate was confirmed, subject to a case. While the case was pending, a second rate was made in conformity with the list which remained unaltered as to the appellants, and the appellants having given the twenty-one days notice of appeal against the rate to the committee, applied to the quarter sessions to enter the appeal against the second rate, without having given a fresh notice to the committee of objection to the list:—

Held, that a fresh notice of objection to the list was a condition precedent to the right to enter the appeal against the second rate.

ON an application by the appellants to the Glamorganshire quarter sessions, held on the 31st of December, 1867, to enter and respite an appeal against a poor-rate, made by the respondents, the overseers of the parish of St. Mary, Cardiff, on the 19th of October, 1867, the application was refused, subject to a case.

The assessment committee of the Cardiff Union on the 24th of April, 1865, duly approved a valuation list for the parish of St. Mary, in which list the appellants were assessed for the East Bute Wharf, in their occupation, in the rateable value of 1421*l.*

The respondents, on the 15th of May, 1867, made a poor-rate, and assessed the appellants on the wharf according to the valuation list. The appellants, on the making of the rate, having previously given the proper notices, objected before the assessment committee, who declined to alter the amount at which the appellants were assessed in respect of the wharf.

The appellants then appealed against the rate to the Court of Quarter Sessions, held on the 11th of October, 1867.

The only question then being whether the appellants were liable to be rated in respect of wharfage rates or dues, the rate was confirmed subject to a case for the opinion of the Court of Queen's Bench as to the appellants' liability to be so rated.

The respondents made another rate on the 19th of October, 1867, in conformity with the same valuation list, and the appellants having previously given twenty-one days notice of intention to appeal to quarter sessions, to the overseers of the parish, and to the assessment committee, made application to enter and respite an appeal against the second rate on the ground that the case granted on the first appeal was not yet disposed of, and that the same question was at issue.

It was objected on the part of the respondents, and admitted

by the appellants, that the appellants after the making of the rate of the 19th of October, 1867, had not (so far as the rate appealed against was concerned) gone before or failed to obtain relief from the assessment committee; and it was contended that a notice of objection ought to have been given to the assessment committee against the valuation list, as a condition precedent to an appeal against the last mentioned rate.

The appellants contended that the rate having been made on a valuation list in which the figures were the same (so far as they were concerned), and which they had objected to before the assessment committee prior to appealing against a former rate, it was unnecessary that they should again give notice of objection to the valuation list and appear before the assessment committee.

If the Court should be of opinion that the Court of Quarter Sessions ought to have granted the application, the appeal against the rate of the 19th of October, 1867, was to be entered and respited.

Field, Q.C., and *Philbrick*, for the respondents. By 27 & 28 Vict. c. 39, s. 1 (1), a notice of objection to the valuation list is a condition precedent to the right to appeal against every rate; non constat, as the committee may at any time amend the list, that they have not done so in the present instance since the appeal against the former rate, or would have amended it if a fresh notice of objection had been given them.

(1) 27 & 28 Vict. c. 39, s. 1:—"Before any appeal shall be heard by any special or quarter sessions against a poor-rate made for any parish contained in any union to which the Union Assessment Committee Act, 1862, applies, the appellant shall give twenty-one days notice in writing previous to the special or quarter sessions to which such appeal is to be made of the intention to appeal, and the grounds thereof, to the assessment committee of such union: Provided, that after the 1st of August next no person shall be empowered to appeal to any sessions against a poor-rate framed in conformity with the valuation list approved of by such committee, unless he shall have given to such committee notice of objection against the said list, and shall have failed to obtain such relief in the matter as he deems just; and which objection, after notice given at any time in the manner prescribed by the said Act with respect to objections, the committee shall hear, with full power to call for and amend such list, although the same has been approved of, and no subsequent list has been transmitted to them, and if they amend the same shall give notice of such amendment to the overseers, who shall thereupon alter their current rate accordingly."

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J. W. Bowen, for the appellants. The court of quarter sessions have confounded two things which are perfectly distinct, the valuation list, and the rate made in conformity with it. The act requires notice of objection to be given to the committee against the valuation list, and not against the rate made in conformity with it; for the committee have nothing to do with making the rate. In this case the appellants have given notice of objection to the list (for it is expressly stated in the case to be unaltered), and have failed to obtain relief, before they applied to enter the appeal against this second rate made in conformity with that list. It would have been idle to go again before the committee; and, moreover, if the committee wished to alter the list, they had ample opportunity given them by the twenty-one days notice of appeal.

THE COURT (Cockburn, C.J., Mellor, Lush, and Hayes, JJ.), were of opinion that a fresh notice of objection against the valuation list should have been given to the assessment committee, before appealing to the quarter sessions against the second rate; and that the sessions were therefore right in refusing to enter and respite the appeal.

Judgment for the respondents.

Attorneys for appellants: *Young, Maples, & Co.*

Attorneys for respondents: *Cunliffe & Beaumont, for R. W. Williams, Cardiff.*

April 28.

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF KINGSTON UNION, RESPONDENTS, *v.* THE OVERSEERS OF MALDEN, APPELLANTS.

Parochial Assessments—Union Assessment Committee Act, 1862 (25 & 26 *Vict.* c. 103), *ss.* 14, 20, 25.

New houses completely finished and ready for occupation, but not let or occupied at the time of returning the valuation list of a parish, are "rateable" hereditaments within the meaning of the Union Assessment Committee Act, 1862, and ought to be inserted in the list.

AN appeal to the Surrey quarter sessions, by the overseers of Malden, against a supplemental valuation list of the rateable hereditaments of the parish, which had been approved by the assessment committee, was dismissed subject to a case.

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Charles Blake is one of the inhabitants of the parish of Malden; and before the making of the supplemental valuation list, he erected upon part of a close of land belonging to him, and situate within the parish, five houses, which, together with garden ground enclosed therewith and for the purpose of occupation therewith, take up about six acres of the land.

Pursuant to 25 & 26 Vict. c. 103, s. 25, the appellants, on the 22nd of February, 1868, made a supplemental valuation list for the parish, and returned such supplemental list to the assessment committee of the Kingston Union, to which union the parish belongs, and in such list no mention was made of the houses and garden ground or of either of them. At the time when the supplemental valuation list was returned to the assessment committee the houses were completely finished and ready for occupation, but neither of them had ever been let or occupied.

The assessment committee, upon the supplemental valuation list being returned to them, altered it by inserting the five unoccupied houses of Charles Blake (1), and they assessed them together with the garden ground attached, at the sum of 425*l.*, as their rateable and net annual value, and the committee accordingly thereby increased the rateable and net annual value of the parish by such sum, and thereby raised the rateable value of the parish from 2444*l.* 5*s.* to the sum of 2869*l.* 5*s.*

In the valuation lists for other parishes of the Kingston Union, where, within the knowledge of the committee, new houses have been erected, houses, finished and ready for occupation, but never having been let or occupied, had been included and assessed.

The appellants, pursuant to the provisions (2) of the said statute, duly objected to the alteration in the supplemental valuation list, on the ground that the five houses ought not to have been inserted therein, inasmuch as they were not finished and fit for occupation; and further, that if they were finished and fit for occupation, they were not in fact occupied; but the assessment committee refused to allow the appellants' objection; and they confirmed the list as altered by them, whereupon the appellants appealed against the list as so altered to the quarter sessions.

Upon the hearing the facts above stated were admitted; and it

(1) Under s. 20. (2) Sections 18, 19.

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was also admitted that, assuming the respondents had a right to insert in the supplemental valuation list the five houses, the assumed rental thereon respectively specified for the same, with the land belonging to each of them respectively, was fair and reasonable.

Two questions were raised for the decision of the justices—First, whether or not the justices assembled had jurisdiction to hear the appeal (1); secondly, whether or not the five houses so finished and ready for occupation, although not in fact let or occupied, ought to be inserted and assessed in the valuation list of the parish, which were the questions for the opinion of the Court.

W. B. Cooper, and *Edward Clarke*, for the appellants. By 25 & 26 Vict. c. 103, ss. 14, 20, and 25, the power given to the overseers and the assessment committee is to insert in any valuation list or supplemental valuation list all "rateable hereditaments" in the parish. "Rateable hereditaments" must mean rateable at the time of making the list, that is, occupied so as to be assessable to the poor-rate. This is clear from the whole scheme of rating to the poor. The original statute, 43 Eliz. c. 2, imposed the poor-rate as a personal tax, or tax on persons in respect of property, and both property and occupier must appear on the rate; *Rex* v. *Aire and Calder Navigation Company*. (2) The 6 & 7 Wm. 4, c. 96, carried this out; and by s. 2 the rate is to be in the form given in the schedule, there being a column for the name of the occupier. By 25 & 26 Vict. c. 103, s. 14, "the overseers of each parish in the union shall, within three calendar months after the appointment of the committee, make a list of all the rateable hereditaments in such parish, with the annual value thereof respectively, in so much of the form shewn in the schedule annexed to 6 & 7 Wm. 4, c. 96, as is set out in the schedule to this act;" and the schedule gives a column for the name of the occupier. This shews that if the property be not occupied at the time the list is made out, it is not "rateable," and ought not to be inserted. This is further shewn by s. 25, under which this supplemental list was made out; for it enacts, that "when and so often as any property not included in the valuation list in force in any parish

(1) The Court holding against the appellants on the other point, this point was not argued; see 25 & 26 Vict. c. 103, s. 32.

(2) 2 B. & C. 713.

becomes rateable," &c., the overseers shall make out a supplemental valuation list. The effect of holding "rateable" to mean property capable of being rated, whether it be occupied or not, is to throw an unjust burthen on the rated occupiers: for the quota or contribution of the parish, under s. 30, to the common fund of the union, is to be calculated on the current rateable value of the property comprised in the list, that is, whether rated or not.

[LUSH, J. That hardship would happen if all the houses in a parish were occupied at the time the valuation list was made, and half were to become unoccupied at the time the rate was made; the occupiers of the remaining half would have to make up the quota.]

When these houses had come into occupation they could now be rated in the next rate, notwithstanding they were not inserted in the valuation list, by 31 & 32 Vict. c. 122, s. 38, which is a strong argument to shew, that until occupation they ought not to have been inserted in the list. (1)

[LUSH, J. The very point has been decided against the appellants' contention as to the county rate under 15 & 16 Vict. c. 81, ss. 2, 6, where the words are "hereditaments rateable to the relief of the poor;" and it was held that houses not actually occupied at the time ought to be taken into account by the committee of justices in preparing the standard for the county rate: *Reg.* v. *Hammersmith* (2); and this involved the same apparent injustice.]

In that case the houses had been occupied at one time, and were only accidentally unoccupied at the time the standard was made.

Field, Q.C., and *Thesiger*, contrà, were not heard.

LUSH, J. We are all of opinion that this case cannot be distinguished from the case of *Reg.* v. *Hammersmith*. (2) "Rateable" property means property in its nature capable of being rated, and

(1) Section 38 of 31 & 32 Vict. c. 122, affords a strong argument against the appellants' contention; for it enacts: "When any person shall occupy any new house, or other building, in any parish . . . . which was incomplete, or *not fit for occupation*, or was not entered as such in the valuation list in force at the time when the current rate was made, the overseers may enter such house or building, with the name of the occupier, in the rate-book," &c.; in the present case the houses were fit for occupation.

(2) 7 W. R. 524; 33 L. T. 183.

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is not confined to property which would be actually inserted in a rate at a time the list is returned. The result, no doubt, is that a parish may have to contribute to the common fund of its union in respect of property which, not being occupied at the time of the rate made towards the contribution, cannot be rated, and does not itself contribute towards the quota, and so a larger sum is necessarily exacted from the rated occupiers of the parish. The answer to the argument derived from this hardship is, that the legislature has so enacted.

HANNEN and HAYES, JJ., concurred.

Judgment for the respondents.

Attorneys for appellants: *R. & C. H. Hodgson.*
Attorney for respondents: *Reddish, for Bartrop, Kingston.*

May 12.

LEVI *v.* SANDERSON.

MIRFIN *v.* ATTWOOD.

Costs—County Courts Act, 1867 (30 & 31 *Vict. c.* 142), *s.* 33, *sch.* (*C.*)—*Action before Verdict after Act—County Courts Acts* (9 & 10 *Vict. c.* 95, *s.* 128; 13 & 14 *Vict. c.* 61, *ss.* 11, 12; 15 & 16 *Vict. c.* 54, *s.* 4)—*Statute of Gloster* (6 *Ed.* 1, *c.* 1)—*Revival of Repealed Statute—Lord Brougham's Act* (13 & 14 *Vict. c.* 21), *s.* 5.

An action on contract was commenced in the Court of Queen's Bench before the passing of the County Courts Act, 1867 (30 & 31 Vict. c. 142), and a verdict was recovered for less than 20*l.* after that statute came into operation. At the time of action brought the superior court had concurrent jurisdiction over the cause of action, under s. 128 of 9 & 10 Vict. c. 95; but that section and all other sections of the former County Courts Acts as to costs were repealed by 30 & 31 Vict. c. 142, s. 33; and fresh enactments substituted, by s. 5, as to actions commenced after the passing of the Act:—

Held, by Lush, Hannen, and Hayes, JJ., that the Statute of Gloster was not repealed as to such an action by any of the restrictive sections of the former County Courts Acts as to costs, and the plaintiff was therefore entitled to costs under the Statute of Gloster.

In a similar case, but where there was neither concurrent jurisdiction in the superior court, nor any sufficient reason for bringing the action in the superior court:—

Held, by Lush and Hayes, JJ., that as to such an action the Statute of Gloster had been repealed by the restrictive sections in the former County Courts Acts;

and that Lord Brougham's Act (13 & 14 Vict. c. 21), s. 5, prevented the Statute of Gloster reviving on the repeal of those enactments by 30 & 31 Vict. c. 142; and the plaintiff was therefore not entitled to costs.

But, by Hannen, J., the restrictive sections of the former County Courts Acts only added conditions to the general enactment of the Statute of Gloster; and the repeal of those sections by 30 & 31 Vict. c. 142, removed those conditions, and left the plaintiff entitled to costs under the Statute of Gloster; and 13 & 14 Vict. c. 21, s. 5, had no application to such a case.

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RULE, calling on the defendant to shew cause why the plaintiff should not be allowed his costs to be taxed by one of the masters.

The action was for goods sold and delivered, and was commenced in April, 1867, and was tried before a county court judge in July, 1868, pursuant to an order of the Court, and a verdict found for the plaintiff for 5*l.*

The plaintiff and defendant resided and carried on business more than twenty miles apart, and no part of the cause of action arose in the district of the county court within which the defendant resided and carried on business (see 9 & 10 Vict. c. 95, s. 128).

The master having refused to tax the plaintiff his costs, this rule was obtained.

Nov. 19, 1868. *Patchett* shewed cause.

Pinder, in support of the rule.

The arguments and cases cited are given in the judgment of the Court, and were similar to those in *Mirfin* v. *Attwood*, argued on the 15th of November.

THE COURT intimated they would consider the two cases together.

Cur. adv. vult.

Feb. 15, 1869. The judgment of the Court (Lush, Hannen, and Hayes, JJ.), was delivered by

HAYES, J. (1) This case, like that of *Mirfin* v. *Attwood*, was an action for goods sold commenced before the passing of the last County Courts Act (30 & 31 Vict. c. 142), and it continued pending for some time after that Act came into operation. In July, 1868, it was ordered to be tried before a county court judge, and a

(1) The judgment was read by Mellor, J.

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verdict was obtained for 5*l.* only, but it was a case of concurrent jurisdiction under s. 128 of 9 & 10 Vict. c. 95; and therefore, if the provisions of the former County Courts Acts had remained in force, the plaintiff would have been entitled, as of right, to obtain a rule or order for his costs, which was not the case in *Mirfin* v. *Attwood.*

Under these circumstances the master having declined to tax the costs, a rule was obtained on behalf of the plaintiff for this purpose; and it was contended for him that as all the restrictive enactments as to costs in the former County Courts Acts were repealed before the trial, and as the case stood unaffected by the new restrictions introduced by the last Act, the plaintiff was entitled to his costs under the Statute of Gloster. The cases of *Restall* v. *London and South Western Railway Company* (1), and the late case of *Mount* v. *Taylor* (2), were relied on as authorities in his favour. On the defendant's part it was contended that the repeal of the former restrictions of the County Courts Acts as to costs did not revive the Statute of Gloster; and *Butcher* v. *Henderson* (3) was cited as an authority on his behalf. It is true that in *Butcher* v. *Henderson* (3) this Court declined to follow the decision of *Restall* v. *London and South Western Railway Company* (1), but it was expressly pointed out in the judgment of the former case that there the plaintiff had become entitled to sign judgment, and that the transaction was therefore complete, before the last Act came into operation; while in *Restall* v. *London and South Western Railway Company* (1) the plaintiff was not entitled to sign judgment, and the transaction remained incomplete until after that period; and though this point was not relied on by the Court of Exchequer, it certainly formed a main ground of the judgment of this Court in *Butcher* v. *Henderson.* (3) The case of *Mount* v. *Taylor* (2) was a case of exclusive jurisdiction in the superior court, which the Court considered to stand on the same footing as a case of concurrent jurisdiction like the present: and there, as here, the transaction remained incomplete until after the 1st of January, 1868. The Court of Common Pleas in that case held that in cases of exclusive or concurrent jurisdiction, where the

(1) Law Rep. 3 Ex. 141. (2) Law Rep. 3 C. P. 645.
(3) Law Rep. 3 Q. B. 335.

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right to costs was substantially preserved by the former County Courts Acts, the Statute of Gloster could not be considered as repealed with regard to such cases, and on this ground, and because the transaction was incomplete before the repeal of the former County Courts Acts took effect, they held the plaintiff entitled to costs, as the Court of Exchequer had done in *Restall* v. *London and South Western Railway Company* (1), though on a different ground.

Looking to these authorities, and having regard to the desirableness of uniformity of decision in cases of this nature, we are not disposed to dissent from the view taken in the case of *Mount* v. *Taylor* (2), and we therefore are of opinion that the plaintiff is entitled to his costs in this case, and that the rule should be made absolute.

Rule absolute.

Attorneys for plaintiff: *King & Plummer.*
Attorney for defendant: *Fiddey.*

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THIS was a similar rule to that in *Levi* v. *Sanderson*, and the facts and dates were similar, but there were no facts bringing the case within s. 128 of 9 & 10 Vict. c. 95; nor any ground for an order or certificate that there was sufficient reason for bringing the action in the superior court, under 15 & 16 Vict. c. 54, s. 4.

Nov. 15, 1868. *Holl* shewed cause. The plaintiff is not entitled to costs. According to *Butcher* v. *Henderson* (3) the repeal of 13 & 14 Vict. c. 61, s. 11, does not revive the Statute of Gloster as to actions commenced before the 30 & 31 Vict. c. 142 received the royal assent. The present action was commenced in July, 1867, and it is governed by the principle there laid down. *Restall* v. *London and South Western Railway Company* (1) is not in point, as that was a case in which the superior court had concurrent juris-

(1) Law Rep. 3 Ex. 141. (2) Law Rep. 3 C. P. 645.
(3) Law Rep. 3 Q. B. 335, 338.

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diction with the county court, which is not the case here. In *Mount* v. *Taylor* (1) a question of title arose, and the county court had no jurisdiction; here the county court had jurisdiction, and there are no facts shewing concurrent jurisdiction or suggesting that it was a proper case to be tried in the superior court, and it has never been decided that in such cases the Statute of Gloster is revived; on the contrary, Willes, J., in *Mount* v. *Taylor* (2), expressly lays it down, "with respect to such cases the Statute of Gloster continues repealed."

Kemplay, in support of the rule. The right to costs must be governed by the law existing at the time the plaintiff becomes in a position to claim them: he was in this position on the day he recovered the verdict, that is, in April, 1868. At that time s. 33 and sch. C. of 30 & 31 Vict. c. 142, had repealed the several sections in the previous County Court Acts, which took away costs in cases where the plaintiff recovered less than a specified amount; but it left unrepealed the Statute of Gloster, and it is under that statute that the plaintiff is entitled to his costs. The dictum of Blackburn, J., in *Butcher* v. *Henderson* (3), that the repeal of 13 & 14 Vict. c. 61, s. 11, does not revive the Statute of Gloster as to actions commenced before the 30 & 31 Vict. c. 142 received the royal assent, was not necessary to the decision of that case, and neither is the distinction made in *Mount* v. *Taylor* (1) that the Statute of Gloster is repealed as to a certain class of actions sound. The Statute of Gloster is a general enactment giving the plaintiff his costs in all actions in which he recovers damages. The County Court Acts, 13 & 14 Vict. c. 61, ss. 11, 12, and 15 & 16 Vict. c. 54, s. 4, only modify the Statute of Gloster, and do not repeal it. But even assuming there was a quasi repeal, those enactments having been themselves repealed, the Statute of Gloster would be revived, unless Lord Brougham's Act (13 & 14 Vict. c. 21), s. 5, applies. Assuming, then, that the Statute of Gloster is revived, is the proposition correct that the right to costs depends upon the law existing at the time the plaintiff becomes entitled to claim costs? The right to costs is not a vested right which must be taken away by an express enactment,

(1) Law Rep. 3 C. P. 645. (2) Law Rep. 3 C. P. at p. 653.
(3) Law Rep. 3 Q. B. at p. 338.

it is a matter of procedure which may be altered during the pendency of the action: *Wright* v. *Hale.* (1) So, in *Charrington* v. *Meatheringham* (2), an action was commenced against parish officers when 13 Geo. 3, c. 78, was in force, which gave them treble costs in the event of the plaintiff being nonsuited; during the pendency of the action that statute was repealed, and judgment was obtained after the coming into operation of 5 & 6 Wm. 4, c. 50, and it was ruled that the defendants were not entitled to treble costs. *Reg.* v. *Mawgan* (3) and *Roadknight* v. *Green* (4) are also strong authorities for the plaintiff. Lastly, does 13 & 14 Vict. c. 21, s. 5, prevent the revival of the Statute of Gloster? It does not, because that section only applies to cases where an Act has been repealed, not by implication, but in express terms, and the repealing Act is afterwards itself repealed. Of the other cases decided on this subject, *Restall* v. *London and South Western Railway Company* (5) is in favour of the plaintiff; and *Oldreeve* v. *Puckridge* (6) is not; in both cases the plaintiff was entitled to judgment before the passing of 30 & 31 Vict. c. 142. In *Mount* v. *Taylor* (7) the judgment was obtained after the passing of that Act, and in this respect is similar to the present case.

Cur. adv. vult.

May 12, 1869. The judges having differed, the judgments of Lush and Hayes, JJ., was delivered by

HAYES, J. In this case, which was argued in last Michaelmas Term, a rule had been obtained calling on the defendant to shew cause why the plaintiff's costs should not be taxed by the master, and the question related to the operation of the County Courts Act, 1867 (30 & 31 Vict. c. 142), on the costs of actions in the superior courts.

The action, which was for goods sold, had been commenced before the passing of that Act. It was by order of a judge tried before the county court of Marylebone, and came on for trial after the Act had come into full operation, when the plaintiff obtained

(1) 6 H. & N. 227; 30 L. J. (Ex.) 40.
(2) 2 M. & W. 228.
(3) 8 A. & E. 496.
(4) 9 M. & W. 652.
(5) Law Rep. 3 Ex. 141.
(6) Law Rep. 3 Ex. 145, n.
(7) Law Rep. 3 C. P. 645.

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a verdict for 13*l*. It was not a case of either exclusive or concurrent jurisdiction in the superior court, nor was it suggested that any ground had existed for obtaining the certificate of a judge, under the repealed County Courts Acts, that there was sufficient reason for bringing such action in the superior court. It was, therefore, a case in which the plaintiff would have been wholly deprived of his costs, if the restrictive enactments on the subject in the previous County Courts Acts (1) had remained in force.

But it was contended for the plaintiff that as these enactments had all been repealed while the action was still pending, upon the County Courts Act, 1867, coming into operation, and as the new provisions contained in sect. 5 of the last Act, did not apply to actions commenced before the passing of that Act, the effect was to revive the Statute of Gloster (6 Edw. 1, c. 1), as to actions like the present, and to entitle the plaintiff to his costs under that statute.

This point was raised but not decided in the Court of Exchequer, in *Restall* v. *London and South Western Railway* (2) and *Oldreeve* v. *Puckridge*. (3) The first of these cases was one of concurrent jurisdiction in the superior court, and the second resembled the present case, but in both of them the event on which the costs depended had occurred before the late Act came into operation; and upon this ground the Court held that the right was concluded by the former Acts, which were then unrepealed, and which entitled the plaintiff to his costs in the first case and deprived him of them in the second. The point was again raised in *Butcher* v. *Henderson* (4), which was a case of exclusive jurisdiction in the superior court, but there also the case was determined on the ground that the transaction having been complete before the new Act came into operation, it was governed by the enactments of the former County Courts Acts. The Court, however, in delivering judgment on the above ground, referred to actions like the present, where the transaction remained incomplete when the repeal came into operation, and expressed an opinion against the right of the plaintiff to costs,

(1) 9 & 10 Vict. c. 95, s. 129; 13 & 14 Vict. c. 61, ss. 11 & 12; 15 & 16 Vict. c. 54, s. 4.

(2) Law Rep. 3 Ex. 141.

(3) Law Rep. 3 Ex. 145, n.

(4) Law Rep. 3 Q. B. 335.

on a supposed revival of the Statute of Gloster, in trivial cases where no order ever would have been made to give him costs before. In *Mount* v. *Taylor* (1) this question was again raised and very fully discussed, in a case where the event determining the costs did not occur until after the late County Courts Act had come into full operation, and therefore the transaction remained incomplete when the repeal of the provisions of the former Acts took effect. That case therefore resembled the present, except that there the cause of action involved questions of title, which gave the plaintiff a right to costs under the former Acts, and the Court there decided that the Statute of Gloster had not been repealed, as to the classes of cases in which, under the former County Courts Acts, the plaintiff would be entitled to costs on obtaining a judge's order or certificate, either on the ground of exclusive or concurrent jurisdiction, or where the circumstances of the case shewed a sufficient reason for bringing the action in the superior court. But with regard to cases like the present, where there was neither exclusive nor concurrent jurisdiction nor any ground for obtaining a judge's order or certificate, a clear opinion was expressed by Willes, J. (2), and not dissented from by the rest of the Court, that as to such cases, the Statute of Gloster had been repealed by the former County Courts Acts, which prevented the plaintiff from obtaining his costs in any way, and that under the provisions of the Act commonly called Lord Brougham's Act (13 & 14 Vict. c. 21, s. 5), the Statute of Gloster was not revived by the Act of 1867, but continued repealed as to such cases. In this opinion, which was substantially the same as that which was expressed by Blackburn, J., in delivering the judgment of this Court in *Butcher* v. *Henderson* (3), my Brother Lush and I concur; and we think that the present rule should be discharged.

HANNEN, J. I regret that I cannot concur in the judgment of my learned Brothers. The cases are so few in which the point here to be determined can arise, that I should not have thought it necessary to make any observations but for the bearing which the decision of my Brothers may have on the question, when a statute

(1) Law Rep. 3 C. P. 645. (2) Law Rep. 3 C. P. at p. 653.
(3) Law Rep. 3 Q. B. 335.

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can be considered to be repealed by implication, and the effect on such a case of a repeal of the repealing statute.

In this case the action was commenced in July, 1867, *before* the passing of the recent County Courts Act. (1) It was tried in April, 1868, *after* the County Courts Act came into operation. If no change had been made in the law relating to costs between the commencement of the action and the trial, the plaintiff would have been entitled to apply to a judge at chambers under 15 & 16 Vict. c. 54, s. 4, to direct that the plaintiff should recover his costs, if he could make it appear to such judge that there was sufficient reason for bringing the action in the court in which it was brought. But by the late County Courts Act (2) the section above referred to (15 & 16 Vict. c. 54, s. 4) was repealed, and it therefore became impossible for the plaintiff to obtain the order of a judge under it. It was, indeed, decided by the Court of Exchequer in *Restall* v. *London and South Western Railway Company* (3), where the verdict was obtained *before* the recent County Courts Act came into operation, that the powers of a judge to make an order under that section still continued, notwithstanding its repeal; but it was held by this Court in *Butcher* v. *Henderson* (4), that after the repeal of the enactment the power to make an order under it was absolutely put an end to, even though it would have been made ex debito justitiæ if the law had remained unaltered. But the legislature at the same time that it repealed the power of a judge to order that the plaintiff should recover his costs, also repealed s. 11 of 13 & 14 Vict. c. 61, by which the necessity for such an order was created. (5)

The language of the 13 & 14 Vict. c. 61, s. 11, is as follows: "If in any action commenced after the passing of this Act in any of her Majesty's superior courts of record in . . . debt . . . the plaintiff *shall recover* a sum not exceeding 20*l*. . . . the plaintiff shall *have judgment* to recover such sum only, and no costs, except in the cases hereinafter provided;" one of these excepted cases being when the order of a judge at chambers, or of the Court, was

(1) 30 & 31 Vict. c. 142.

(2) 30 & 31 Vict. c. 142, s. 33, and sch. (C.)

(3) Law Rep. 3 Ex. 141.

(4) Law Rep. 3 Q. B. 335.

(5) See 30 & 31 Vict. c. 142, s. 33, and sch. (C.)

obtained under s. 13 of that Act, for which was afterwards substituted s. 4 of 15 & 16 Vict. c. 54.

I think that the effect of thus repealing with one breath the enactment which empowered a judge or the Court to order that the plaintiff should recover his costs, and that which imposed this as a condition on the obtaining his costs, is, to leave the plaintiff in the position in which he would have been before the existence of the repealed statutes, that is, entitled to recover his costs under the Statute of Gloster.

It was contended for the defendant that the decision in *Butcher* v. *Henderson* (1) was opposed to this view; but I think that is not so. In that case the plaintiff in an action of trespass recovered a verdict for less than 5*l.* before the late County Courts Act was in force; he was therefore entitled to a judgment for the amount of the verdict, and no costs, unless he obtained an order of a judge under 15 & 16 Vict. c. 54, s. 4, which he had an opportunity of doing, but did not do before the enactment was repealed. The Court, applying the maxim "Nova constitutio futuris formam imponere debet, non præteritis," held that the transaction was complete when the plaintiff recovered his verdict, and that as at that time he was entitled to recover judgment for less than 5*l.* and no costs, unless he got an order which he failed to do, the repeal of the statute could not operate to give him a right to a different judgment. This Court expressly rested its judgment on the fact that the event on which the plaintiff's right to costs depended, namely, recovery by verdict, occurred before 30 & 31 Vict. c. 142, came into operation, and this has been pointed out to be the ratio decidendi of the case by Montague Smith, J., in *Mount* v. *Taylor*. (2) But in the present case, when the plaintiff recovered his verdict there was no statute in existence which deprived him of costs unless he obtained an order of a judge, he is therefore entitled to have his costs under the general enactment of the Statute of Gloster, that the plaintiff in all actions in which he recovers damages shall also recover against the defendant his costs of suit.

It was however contended for the defendant that the Statute of Gloster was repealed by the County Courts Acts as to all actions of debt in which the plaintiff recovers less than 20*l.*, and that

(1) Law Rep. 3 Q. B. 335. (2) Law Rep. 3 C. P. at p. 655.

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the subsequent repeal of these statutes did not revive the Statute of Gloster by reason of s. 5 of Lord Brougham's Act (13 & 14 Vict. c. 21). This point was under the consideration of the Court of Common Pleas in *Mount* v. *Taylor* (1), and for the reasons which are so fully given in the judgments in that case, I think that the Statute of Gloster was not repealed by the County Courts Acts, but that conditions only were imposed on its operation such as the obtaining the judge's order; and that when the conditions were fulfilled the right to costs was derived from the Statute of Gloster. Willes, J., says (2): "If the records of the Court be searched from the passing of the County Courts Acts to the present day, it will be found that the costs have always been taxed upon the Statute of Gloster, and not upon the order of the judge, that order being treated only as evidence of the right. The records therefore . . . lead to the inevitable conclusion that the Statute of Gloster was in force as to all cases *in which a judge's order could be obtained* under the County Courts Acts, and that it was the Statute of Gloster in such cases which gave the plaintiff his costs, while the County Courts Acts rendered the obtaining a judge's order a necessary condition, and it is the statutes imposing this condition only which have been repealed by the Act of last year." It is true that in *Mount* v. *Taylor* (1) the action could not have been brought in the county court, but the reasoning of the learned judges is equally applicable to a case like the present where the county court had jurisdiction. I would refer particularly to the judgment of Montague Smith, J., which appears to me conclusively to establish that the Statute of Gloster cannot properly be said to be repealed, as to those cases in which a judge had power to certify that the plaintiff recover his costs. To impose a condition on a class of plaintiffs before they shall be entitled to the benefit of a statute is not a repeal of it as to them, and it is only by a figure of speech that it has been so described; it merely intercepts in the specified cases the operation of the statute which remains in existence and unrepealed notwithstanding. The 5th section of Lord Brougham's Act (13 & 14 Vict. c. 21) has for its object to prevent the revival of a statute contrary to the intention of the legislature; but it cannot be supposed that it is contrary to the

(1) Law Rep. 3 C. P. 645. (2) Law Rep. 3 C. P. at p. 653.

intention of the legislature to restore to a statute its original force without condition, where all that it has done has been to repeal the condition; and it can make no difference that other qualifications are introduced, which are not applicable to all the cases to which the repealed condition attached.

It appears to me that the few cases in which the circumstances can be similar to the present were not in the contemplation of the legislature when it enacted the recent County Courts Act; and I think it better to say so than to put a construction on the statute which may create an embarrassing precedent on other occasions. I think therefore our judgment should be for the plaintiff.

Rule discharged. (1)

Attorney for plaintiff: *G. H. Mirfin.*

Attorneys for defendant: *Dod & Longstaffe.*

THE QUEEN, ON THE PROSECUTION OF THE GUARDIANS OF THE STRAND UNION, RESPONDENTS; *v.* THE GOVERNORS AND GUARDIANS OF EXETER, APPELLANTS.

May 12.

13 C.L.D. 298

Evidence—Declaration or Entry of a deceased person against Proprietary Interest—Poor—Settlement by Renting a Tenement, under 6 *Geo.* 4, *c.* 57, *s.* 2*—Evidence of Payment of the Rent—Presumption of Payment from Undisturbed Occupation.*

A declaration or written entry by a deceased person when occupier of a house that he was tenant at so much rent, and had paid it, is admissible evidence, as a declaration against proprietary interest, to prove the fact of the payment as well as of the tenancy, and so to shew that the deceased had acquired a settlement, under 6 Geo. 4, c. 57, s. 2, by renting a tenement.

Quære, whether undisturbed occupation for four years by a person proved to be a tenant at a rent, is not presumptive evidence that the rent has been paid.

ON appeal to the Middlesex Quarter Sessions against an order of removal of James McGuire from the Strand union to the Exeter union, the sessions confirmed the order, subject to a case.

(1) Cockburn, C.J., was present during the argument; but inadvertently his concurrence was not obtained to either of the judgments delivered. The reporters have authority for saying that the inclination of his lordship's opinion was in favour of the view of Hannen, J. It was unnecessary, however, to have the case re-argued, as even if the Lord Chief Justice had pronounced judgment in concurrence with Hannen, J., the rule would have dropped instead of being discharged.

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The pauper James McGuire was the maternal grandson of Nathaniel Welsford, who, it was alleged, acquired a settlement (which was the settlement relied on) in the parish of St. Sidwell's, within the appellants' union, by renting a tenement for some time in 1826 until Midsummer, 1830.

All facts necessary to substantiate a settlement of Welsford in the appellants' union by renting a tenement were admitted as having been proved, except the fact of actual payment of rent (under 6 Geo. 4, c. 57, s. 2).

It was proved that Welsford rented the tenement for the above-mentioned period, and that he died many years ago.

Margaret McGuire, his daughter and the pauper's mother, deposed that she had heard her deceased father state that he rented the house (being the above-mentioned tenement) of James Brook at 22*l.* a year, and paid the rent for the same.

This was objected to by the appellants as inadmissible to prove payment of rent, but was admitted on the ground that it was a declaration of a deceased person against proprietary interest, and on the authority of *Reg.* v. *Birmingham.* (1)

Margaret McGuire also produced a book which contained, as she deposed, the following, amongst other entries in her father's handwriting:—

"21 May, 1830. Paid James Brook part of a quarter's rent due Midsummer next, 2*l.* 10*s.*

"12 July, 1830. Paid Brook balance of a quarter's rent due 24 June last, 3*l.*; deduct way rate, 3*s.* 6*d.*" (2)

This evidence was also objected to as inadmissible to prove payment of rent, but the entries were admitted and read on the same ground.

The sessions found that sufficient proof had been given of the payment of rent, and that Welsford had gained a settlement in Exeter.

The question for the Court was, whether the above evidence was rightly admitted. If it was, the order of sessions was to be affirmed; if it was not, the orders were to be quashed.

(1) 1 B. & S. 763; 31 L. J. (M.C.) 63.

(2) If Welsford was only tenant till Midsummer, 1830, this entry would appear to have been made after he ceased to be occupier.

April 28. *Poland*, for the respondents. Declarations, both verbal and written, by a deceased occupier, are admissible as against proprietary interest, not only to prove the fact of the tenancy, but the collateral facts connected with it: *Reg.* v. *Birmingham* (1); and therefore to prove the fact of the payment of the rent.

Lopes, for the appellants. The 6 Geo. 4, c. 57, s. 2, requires that the rent should have been paid. This is a substantive fact which must be proved in order to shew that a settlement has been gained. The whole of the written entry amounts to no more than that the deceased had paid 5*l.* 10*s.* to Brook. If this entry is held admissible in the present case, if an ejectment were brought and it became necessary to prove payment of rent within twenty years, the same declaration would be admissible. In the fourth and later editions of Smith's Leading Cases, it is laid down in the notes to *Higham* v. *Ridgway* (2): "The tendency, however, of the more recent decisions seems to be in favour of limiting the extent to which the admissibility of both sides of an account should be carried. In *Knight* v. *Waterford* (3) a steward's account contained on one side an entry of a receipt of money, 30*l.*, and on the opposite side an entry in discharge of the former item. It was sought to give both the entries in evidence, and *Stead* v. *Heaton* (4), *Bullen* v. *Michell* (5), *Williams* v. *Geaves* (6), were cited. Alderson, B., however, refused to receive the entry in discharge, expressing an opinion that *Stead* v. *Heaton* (4) goes to the extreme verge of the law; and that all the reasons for the decision in *Bullen* v. *Michell* (5) were not satisfactory. This judgment was afterwards approved of by the Court of Common Pleas in *Doe* v. *Beviss* (7), when the subject underwent an elaborate discussion . . . Williams, J., saying: 'It seems to me that the doctrine laid down by the Court of Exchequer in *Davies* v. *Humphreys* (8), upon the authority of *Higham* v. *Ridgway* (9) and *Doe* v. *Robson* (10), that the entry of a payment against the interest of the party making it is to have the effect of proving the truth of other statements contained in the same entry

(1) 1 B. & S. 763; 31 L. J. (M.C.) 63.
(2) 2 Sm. L. C. 6th ed. 305.
(3) 4 Y. & C. 283, 294.
(4) 4 T. R. 669.
(5) 2 Price, 399.
(6) 8 C. & P. 592.
(7) 7 C. B. 456; 18 L. J. (C.P.) 128.
(8) 6 M. & W. 153, 166.
(9) 10 East, 109.
(10) 15 East, 32.

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and connected with it, has gone far enough. I for one do not feel inclined to carry it any farther.' "

Cur. adv. vult.

May 12. The judgment of the Court (Lush, Hannen, and Hayes, JJ.) was delivered by

HAYES, J. This was a case from the Middlesex sessions respecting the admissibility of evidence on the trial of an appeal relating to the settlement of one James McGuire, who had been removed from the Strand union to Exeter, where it was alleged that he had a derivative settlement from his maternal grandfather, gained in St. Sidwell's parish, Exeter, by renting a tenement.

It was proved that the grandfather, who had been long dead, had rented and occupied a house in St. Sidwell's parish for four years, ending at Midsummer, 1830; and the pauper's mother was called to prove that she had heard her father say that he had rented the house of James Brook at 22*l.* a year, and had paid the rent for it; and she produced a book containing entries in his handwriting, stating that he had paid Brook two sums amounting to 5*l.* 10*s.* for the quarter's rent due at Midsummer, 1830. The verbal statement and the entries in the book were both objected to, as inadmissible evidence as to the fact of the payment of the rent; but the sessions received them subject to a case, which was argued before us in last term, and we are of opinion that they were rightly received by the sessions.

As the four years' occupation by the grandfather would have been good presumptive evidence of a seisin in fee, his declaration, which rebutted the presumption and cut down his estate, was clearly admissible as a declaration against proprietary interest. The case is undistinguishable in this respect from *Reg.* v. *Birmingham* (1), where it was held, on a similar question, that a declaration by a deceased occupier of a house that he held at an annual rent of 20*l.*, was evidence, not merely as to the fact of the tenancy, but also as to the amount of the rent; and we consider it equally evidence as to the fact of payment. It would be absurd to hold that a declaration was admissible, but to hold that it was no evidence as to one of the main facts which it imported.

(1) 1 B. & S. 763; 31 L. J. (M.C.) 63.

The principle, that a declaration against interest was evidence as to all that formed an essential part of it, was long since settled as to a declaration against pecuniary interest in *Higham* v. *Ridgway* (1) and the numerous cases that followed; and this principle was applied to declarations against proprietary interest in the case of *Reg.* v. *Birmingham* (2); as it had been in several earlier cases.

It was pressed on us that there was a distinction between the first declaration and the written entry, as the latter did not expressly mention the tenement; but we cannot appreciate this distinction. It was a question of fact for what the rent was payable, and having regard to the other evidence in the case, it was plain that the entry could only apply to the house occupied by the grandfather.

Having regard to the great changes that have, in recent times, been made in admitting the evidence of interested witnesses, when alive, it would be most objectionable to lay any narrow restrictions upon the reception of declarations in any way against interest which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer, and where the Courts are frequently obliged to supply the want of evidence by presumptions. Indeed in cases like the present we think that, independently of the declarations, the undisturbed occupation by the tenant of the premises for four years would of itself lead to the presumption of the fact of payment of the rent.

Order confirmed.

Attorney for appellants: *J. Elliott Fox.*

Attorneys for respondents: *C. & J. Allen & Son.*

(1) 10 East, 109.

(2) 1 B. & S. 763; 31 L. J. (M.C.) 63.

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May 11.

THE QUEEN *v.* PLENTY.

Municipal Corporation—Election of Town Councillor—Voting Papers—Misnomer—Initials instead of Christian Names—5 & 6 Wm. 4. c. 76, ss. 32, 142.

1 CPD. 549
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By 5 & 6 Wm. 4, c. 76, s. 32, at the election of councillors of a borough, each burgess may vote by delivering a voting paper containing the christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions; by s. 142, no misnomer or inaccurate description of any person . . . in any voting paper . . . shall hinder the full operation of the Act with respect to such person . . . provided that the description of such person . . . be such as to be commonly understood.

In the nomination papers, under 22 Vict. c. 35, ss. 6, 7, a candidate was rightly nominated as William Penford, and the names were so published by the town clerk. There was no other person of the name of Penford qualified in the borough. In some of the voting papers the candidate voted for was inserted as W. Penford:—

Held, that the initial W. instead of William, was a misnomer cured by s. 142; and the voting papers were therefore valid.

INFORMATION in the nature of a quo warranto, to try whether the defendant Plenty, or the relator William Penford, was elected town councillor of the municipal borough of Newbury, at the election on the 1st of November, 1867.

After issue joined, a case was stated by consent, from which it appeared that there were four vacancies, and the relator and the defendant were two out of five candidates duly nominated.

In the nomination paper, as required by 22 Vict. c. 35, s. 6, the entry as to the relator was "William Penford, Newbury, Draper;" and the town clerk, as required by s. 6, duly published the names, place of abode, and description of the relator as above.

No other person bearing the surname of Penford was nominated at the election, and the relator was the only person of the name of Penford who was duly enrolled as a burgess, or qualified under 5 & 6 Wm. 4, c. 76, to be elected a town councillor.

The defendant was the last of the candidates returned as elected, having an apparent majority of one over Penford; but Penford had, in fact, a majority of valid votes over the defendant, if he was entitled to count as valid votes in his favour certain voting papers; in which, among the candidates voted for, was "W. Penford, Northbrook Street, Draper."

The question for the Court was, whether the voting papers were or were not invalid, by reason of the initial W. only being used.

April 28. *H. Rogers* (*Baylis* with him), for the relator. By 5 & 6 Wm. 4, c. 76, s. 32, the voting paper is to contain the christian name and surname of the person for whom the burgess votes; but these voting papers, although the candidate's christian name was expressed by an initial only, were cured by s. 142, being such as to be commonly understood; indeed, since 22 Vict. c. 35, ss. 6, 7 & 8, which require the candidates to be nominated, there can be no doubt as to who is intended when a particular candidate is designated by the initial instead of his christian name in full, unless there are two candidates with the same surname and christian names beginning with the same initials. In *Reg.* v. *Hartlepool* (1), a claimant was held entitled to be put on the burgess roll under s. 17 of 5 & 6 Wm. 4, c. 76, notwithstanding his christian names were expressed by initials only.

[LUSH, J. That section says nothing about the christian and surname; the notice of claim is to be in the form sch. D. 2, or to the like effect.]

Sch. D. 2, gives the christian name in full.

Gray, Q.C., for the defendant. These voting papers are bad under s. 32, and are not cured by s. 142. The statute requires that the voting paper shall contain the christian name and surname of the candidate; and as this is absolutely required, we cannot inquire into the reason of the requisition. In *Reg.* v. *Avery* (2) the Court drew a distinction between the signature required to the voting paper and the requirement as to the candidate's names, and accordingly held the ordinary signature, with the christian names expressed by initials, to be sufficient. But in *Reg.* v. *Bradley* (3) all the judges, while holding the contraction Wm. to sufficiently shew William was meant, expressed a clear opinion that an initial would not be sufficient, inasmuch as it might stand for any of the names of which it is the initial letter. This is not a misnomer cured by s. 142; the voter intended to put an initial, and did not

(1) 2 L. M. & P. 666; 21 L. J. (Q.B.) 71.

(2) 18 Q. B 576; 21 L. J. (Q.B.) 428.

(3) 3 E. & E. 634; 30 L. J. (Q.B.) 180.

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put a wrong name by mistake: *Reg.* v. *Coward* (1), and *Melbourne* v. *Greenfield* (2), under the Parliamentary Registration Act.

[LUSH, J. In those cases there was an entirely wrong place of abode inserted.

HAYES, J. The nomination papers published by the town clerk with the right names in full, must make it known to the whole borough who are the candidates, and therefore who is intended by a particular voting paper with the initials only of the christian names.]

There were no nomination papers in 5 & 6 Wm. 4, c. 76. This is not an unintentional mistake, but an intentional insertion of the initial W., owing to a mistake of law; and is therefore not cured as a misnomer or inaccurate description: *Eidsforth* v. *Farrer.* (3) It is to be observed, that there is no statement in the case that the voting paper was commonly understood to apply to the relator.

[HAYES, J. The facts stated shew that there could not be any doubt as to who was intended.]

Rogers, in reply. This is something less than an inaccurate description, and does not even amount to a misnomer; at all events if it is either, it is cured by s. 142.

[LUSH, J. In *Reg.* v. *Tugwell* (4) it was held that the name was no part of the description, and that the entire omission of the description was, therefore, not an inaccurate description. By 22 Vict. c. 35, s. 6, the same particulars are required as in voting papers; suppose in the nomination the initials only were inserted, would it be valid? The same construction must apply to both.]

No: s. 142 does not apply to nomination papers, which therefore must contain the christian names at length. *Reg* v. *Thwaites* (5) is a much stronger case than the present; there certain burgesses were on the burgess roll with wrong christian names, and they signed the voting papers with the wrong names, and yet the votes were held valid. Suppose the voters intending to vote for the relator had written Walter Penford, that would have been a misnomer and cured, and why not W. Penford?

Cur. adv. vult.

(1) 16 Q. B. 819; 20 L. J. (Q.B.) 359.

(2) 7 C. B. (N.S.) 1; 29 L. J. (C.P.) 81.

(3) 4 C. B. 9; 16 L. J. (C.P.) 132.

(4) Law Rep. 3 Q. B. 704.

(5) 1 E. & B. 704; 22 L. J. (Q.B.) 238.

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May 11. The judgment of the Court (Lush, Hannen, and Hayes, JJ.) was delivered by

HANNEN, J. The question in this case is, whether William Penford was, in November, 1867, duly elected a councillor for the borough of Newbury. It appears from the case that he was so elected, if he was entitled to count as valid certain voting papers in which he was designated by the initial of his christian name (thus, W. Penford), instead of by his christian name and surname in full. By s. 32 of the Municipal Corporation Act, 5 & 6 Wm. 4, c. 76, it is enacted that "every burgess entitled to vote may vote by delivering a voting paper containing the christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions." The interpretation clause (s. 142), enacts that no misnomer or inaccurate description of any person, body, corporate, or place . . . in any voting paper required by this Act . . . shall hinder the full operation of this Act, provided that the description of such person, body, corporate, or place, be such as to be commonly understood.

We are of opinion that the voting papers in question were valid, on the ground that the designation of the person voted for by the initial of his christian name is a "misnomer," and is therefore cured by the interpretation clause.

It was contended for the defendant, that where the initial only is used, there is a total omission of the name, which is not cured by the interpretation clause, and in support of this contention the case of *Reg.* v. *Bradley* (1) was referred to, where Hill, J., says that an initial cannot be regarded as a christian name. The question for consideration there was, whether the abbreviation Willm. for William vitiated the vote, and the Court held that it did not; the dictum referred to was, therefore, not necessary for the decision of the case.

The initial W. is intended certainly as an abbreviation of some name or other; its defect is that it may be taken to be an abbreviation of any one of the other names beginning with W., such as Walter, instead of the right one, William; but if any one, or even all of the wrong names which it might be mistaken for were written in full, this would certainly be cured. This being so, it is

(1) 3 E. & E. 634; 30 L. J. (Q.B.) 180.

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impossible to suppose that the legislature did not intend to include, under the term "misnomer," an abbreviation which could be, and in this case undoubtedly was, understood to indicate the correct name.

We are of opinion that the word "misnomer," which means a naming amiss, is wide enough to cover the faulty indication of a christian name by means of the initial: Vide Bac. Abr., tit. Misnomer.

This construction has already been put upon the word misnomer in another statute. By 3 & 4 Wm. 4, c. 42, s. 11, it is enacted that no plea, in abatement for a *misnomer*, shall be allowed in a personal action, but that in all cases in which a misnomer could, but for that Act, have been by law pleadable in abatement, the defendant shall be at liberty to cause the declaration to be amended, upon summons. In the case of *Rust* v. *Kennedy* (1), it was sought to set aside the writ and declaration for irregularity, on the ground that the defendant was described by his initial only, the action not being on a bill of exchange or other written instrument. It was there contended, as here, that it was not a mere case of misnomer, because the initials were no name at all; but Parke, B., pointed out that before the statute of Wm. 4, this was an objection which was pleadable in abatement as a misnomer, and that since that Act the only remedy was by summons, and that this case was within the statute.

Our judgment will therefore be for the relator.

Judgment for the Crown.

Attorney for relator: *Southgate.*

Attorneys for defendant: *Rickards & Walker, for Mecey, Thatcham.*

(1) 4 M. & W. 586.

THE QUEEN *v.* THE WALLASEY LOCAL BOARD OF HEALTH. 1869 *May* 11.

Public Health Act, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 144—*Compensation to Owner of House Damaged by Raising of Level of Street.*

A local board of health gave notice under 11 & 12 Vict. c. 63, s. 69, to the owner of a house abutting on a street to level and pave it, and in default of the owner, they did the work themselves. By the alteration so caused in the level of the street, the access to the house was rendered difficult and dangerous:—

Held, that the owner was entitled to compensation under s. 144.

RULE, calling on the Wallasey Local Board of Health to shew cause why a writ of mandamus should not issue, commanding them to cause compensation to be made to Evan Thomas, out of the general or special rate, to be levied under the Public Health Act, or the Local Act, or other Acts incorporated therewith, for the damage sustained by Thomas by reason of the exercise by the board of the powers of the said Acts.

Evan Thomas was the owner in fee of a dwelling house in or abutting upon Grosvenor Road, New Brighton, in the district of the Wallasey Local Board of Health, the street not being a highway.

On the 28th of December, 1865, a notice was served on Thomas by the board, to sewer, level, pave, and channel the parts of the street opposite his premises within twenty-eight days. Thomas made default in complying with the notice, and the board in May, 1868, commenced the works and completed them in October; the contribution payable by Thomas in respect of the works was 71*l.* 8*s.* 6*d.*

In executing the works the level of the road was raised opposite Thomas's house, and a portion of the doorway was, as he alleged, permanently blocked up; and the access from the street to the house and to the doorway rendered difficult and dangerous.

April 26. *Milward, Q.C.*, and *R. G. Williams*, shewed cause. The board purport to have acted under s. 69 of 11 & 12 Vict. c. 63 (1), and Thomas claims compensation under s. 144. If what

(1) 11 & 12 Vict. c. 63, s. 69:—"In case any present or future street, or any part thereof (not being a highway), be not sewered, levelled, paved, flagged, and channeled to the satisfaction of the Local Board of Health, such board may, by notice in writing to the respective owners or occupiers of the premises, fronting, adjoining, or abutting upon such parts thereof as may require to be

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the board has done is not within the Act, the claimant's remedy is by action; if it is within the Act, it is not the subject of compensation, because the claimant ought to have done the works himself. Suppose a mandamus to go, and the amount of compensation claimed to be raised by a rate on the district, it may ultimately fall on the owner and so on the claimant himself: 21 & 22 Vict. c. 98, ss. 62, 63.

G. Bruce, in support of the rule. The claimant, under s. 69, no doubt is bound to do the works required by the local board, or repay them the expenses they incur on his default. But s. 144 is in the most general terms, and secures full compensation to all persons sustaining any damage by reason of the exercise of any of the powers of the Act. Supposing the claimant to have done the works himself, he would have done this as the agent of the local board; and the damage would not the less have accrued by reason of the exercise of the powers of the Act.

LUSH, J. There is at any rate so much doubt that the Court ought not to refuse a mandamus; but if the parties consent to be bound by the decision of the Court at the present stage, we will consider the matter.

This consent having been given,

Cur. adv. vult.

May 11. The judgment of the Court (Lush, Hannen, and Hayes, JJ.) was delivered by

HANNEN, J. In this case a rule was obtained for a mandamus to the Wallasey Local Board of Health, to cause compensation to be made to Evan Thomas for damage by him sustained, by the exercise of the local board of the powers of the Public Health Acts.

The local board, acting under s. 69 of the Public Health Act,

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sewered, levelled, &c., require them to sewer, level, &c., within a time to be specified in such notice; and if such notice be not complied with the local board may, if they think fit, execute the works mentioned or referred to therein; and the expenses incurred by them in so doing shall be paid by the owners in default, in proportion to the frontage of their respective premises," &c. (The form of notice is given by 24 & 25 Vict. c. 61, s. 17, sch.)

S. 144:—"Full compensation shall be made out of the general or special district rates to be levied under this Act, to all persons sustaining any damage by reason of the exercise of any of the powers of this Act," &c.

1848 (11 & 12 Vict. c. 63), required Evan Thomas and other owners of premises in a certain street in New Brighton, to sewer, level, pave, and channel the same; and the said Evan Thomas having made default in complying with the notice, the board executed the required works, and claims as contribution payable by Evan Thomas in respect of the works the sum of 71*l.* 8*s.*

It is alleged by Evan Thomas that the effect of the works, as executed, is to obstruct the entrance to his house, and to render the access to his doorway dangerous and inconvenient, and in respect of the injury he claims compensation under s. 144, which enacts that full compensation shall be made to all persons sustaining any damage by reason of the exercise of any of the powers of the Act.

It was contended on behalf of the local board, that inasmuch as the owners of the houses in the street were bound to do the works themselves, or if done by the board to pay for them, they could not be entitled to compensation for injury incurred by the works. We are of opinion, however, that this argument is not well founded. There is no necessary connection between the cost of the works and the damage which they may occasion. The raising of the level of a street may be very advantageous to the majority of the houses in it, but very injurious to one. Although, therefore, the owner of that house may be bound under s. 69 to pay his proportion of the cost (having regard to the frontage of the house) of altering the level, he may still be entitled to compensation out of the general district rate for the special damage which he has sustained in order that his neighbours and the district generally should be benefited.

We are therefore of opinion that Evan Thomas is entitled to have it ascertained whether or not he has sustained damage by the execution of the works in question, and to receive compensation for such damage, if any.

The rule will therefore be made absolute for a mandamus, and the parties have agreed to be bound by our decision.

Rule absolute.

Attorneys for prosecutor: *Neal & Philpot, for W. & A. Clare, Liverpool.*

Attorneys for defendants: *Norris, Allen, & Carter, for Simpson & North, Liverpool.*

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April 24.

THE QUEEN, on the Prosecution of THE GREAT WESTERN RAILWAY COMPANY, Appellants; *v.* THE INHABITANTS OF LLANTRISSANT, Respondents.

Poor-rate—Railway—Contributive Value.

QQB 138-9, 140-1

The E. V. Railway runs through the parish of L., and forms a junction with the appellants' railway, who occupy the E. V. Railway at a fixed rent. On appeal against a poor-rate in the parish of L.:—

Held, that the case was governed by *Great Eastern Railway Company* v. *Haughley* (Law Rep. 1 Q. B. 666), and that the appellants were to be rated only in respect of the profits which the E. V. Railway earned within the parish of L., and that the value of the traffic contributed by the E. V. Railway to the appellants' main line of railway ought not to be taken in consideration, in estimating the amount of the rate in the parish of L.

On an appeal to the Glamorganshire Quarter Sessions by the Great Western Railway Company against a poor-rate of the 3rd of January, 1868, for the parish of Llantrissant, in which the appellants were rated, as occupiers of the Ely Valley Railway and branches, at a gross estimated rental of 800*l.* and a rateable value of 400*l.*, the sessions amended the rate by reducing the rateable value from 400*l.* to 270*l.*, subject to the opinion of the Court upon the following case:

The Ely Valley Railway commences at Dinas, a few chains beyond the northern extremity of the parish of Llantrissant, and running through that parish to a point a few chains beyond its southern boundary forms a junction with the South Wales Railway. It has two branches, called respectively the Mynydd branch and Gellyshaidd branch. It is also connected at or near Mynydd with the Llantrissant and Taff Vale Junction Railway, and at the South Wales Junction with the Cowbridge Railway, which have running powers over a portion of the main line and one of the branches.

The branches are situate wholly, and the main line chiefly, in the parish of Llantrissant, it being admitted, for the purpose of this case, that the entire length of railway is ten miles and seventeen chains, of which seven miles and twenty-three chains are situate in this parish.

The traffic is chiefly mineral, and is produced from iron and coal works which are situate partly within and partly beyond the parish. The greatest portion of that traffic is brought by the Ely

Valley Railway to the South Wales Railway, and conveyed for some distance over that line and over other portions of the Great Western Railway Company's lines.

The South Wales line is the property of the appellants, who are also the occupiers of the Ely Valley Railway and branches, under an agreement for a lease for 999 years from the 1st of January, 1861 (which agreement was confirmed by 25 Vict. c. cxcvi.), by which the appellants undertook to pay the Ely Valley Railway Company a fixed rent for the year 1864 of 3000*l.*, for the year 1865 of 3750*l.*, and for the year 1866 and remaining period 4000*l.*

The Ely Valley Railway brings a considerable amount of traffic to the appellants' South Wales line, which thus derives benefit from the Ely Valley Railway as a feeder to the main line.

In the poor-rate made the 3rd of January, 1868, for the parish of Llantrissant, at 12*d.* in the pound, the appellants were assessed as occupiers of the Ely Valley Railway and branches at the rateable value of 400*l.*

The appellants appealed upon the grounds that they were overrated. That the rate was not made on an estimate of the net annual value, and that the rate was not made in conformity with the 27 & 28 Vict. c. 39, s. 4.

On the hearing it was agreed that the only question for the sessions was, whether the value of the traffic, contributed by the Ely Valley line and branches as bringing traffic to any portion of the Great Western Railway Company's South Wales line, was to be taken into consideration in estimating the amount of the rate in the parish of Llantrissant.

And it was also agreed that if the contributive value of the Ely Valley line, so bringing traffic to any portion of the Great Western line, was not to be taken into consideration, the rate was to be amended by reducing the rateable value to 270*l.*; but if such contributive value was to be taken into consideration, the rate was to be affirmed.

The sessions decided the above question in the negative, and reduced the rateable value to 270*l.*

The question for the opinion of the Court was, whether the respondents are entitled to take into consideration in their assessment the value of the line to the appellants as bringing traffic to the

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Great Western Railway Company's South Wales line, in addition to the net profit as derived from the traffic passing through the parish of Llantrissant.

If the Court should be of opinion that the question should be answered in the affirmative, the order of sessions was to be quashed and the rate affirmed; but if the Court should be of the opposite opinion, the order of sessions was to be confirmed.

Field, Q.C., and *J. W. Bowen*, for the appellants. The question raised in this case has been in effect decided in *Great Eastern Railway Company* v. *Haughley*. (1) It was there decided that a railway must be rated in respect of the profit earned in the particular parish, and that profit earned in other parishes could not be taken into account to enhance the value.

THE COURT then called upon

Michael, for the respondents. There is no doubt that the parochial and not the mileage principle of valuation is to be followed in rating a railway; but in certain cases profits earned without the parish are to be added to those earned within the parish, in estimating the rateable value; and further, although rent actually paid cannot be taken as an absolute criterion of value, yet it is primâ facie evidence of it. Here the appellants give the large rent of 4000*l.* for the Ely branch, that is greatly in excess of the profits earned by the branch line, and it is clear that the hypothetical tenant would give more for the branch line than the actual profits earned on it. The rateable value is what that tenant would give. *South Eastern Railway Company* v. *Dorking* (2) is precisely this case. Lord Campbell, C.J., there says (3): "The liability of the appellants to be assessed to the relief of the poor in the parish of Dorking in respect of the portion of the Reading line in that parish cannot be confined to the net profits derived by the appellants from the traffic passing through that parish. . . The rent that was paid by the appellants is strong evidence that it was of greater value to them than the mere net profit from traffic upon it." *Newmarket Railway Company* v. *St. Andrews* (4) is also in point. *London and North Western Railway Company* v. *Cannock* (5) is in favour of the re-

(1) Law Rep. 1 Q. B. 666.
(2) 3 E. & B. 491; 23 L. J. (M. C.) 85.
(3) 3 E. & B. at p. 513; 23 L. J. (M. C.) at p. 95. 18 Jur 572
(4) 3 E. & B. 94; 23 L. J. (M. C.) 76.
(5) 9 L. T. 325.

18 Jur 673, 679.

spondents. There Cockburn, C.J., says: "Rent is primâ facie evidence of value. Suppose at this moment there were no lease, and the appellants wanted to take it, what is the rent they would give? They would arrive at that by this process. What is the traffic on the branch, what are the expenses, what are the profits it would produce to the main line?" And Blackburn, J., says, "What would be the elements of the rent? Why, amongst others, the capacity to add to the takings of the main line." The Court cannot decide against the respondents without overruling those cases. *Great Eastern Railway Company* v. *Haughley* (1) is distinguishable. There the rate was sought to be made on the mileage principle in disguise; it was an attempt to bring in traffic, not originating in the parish, as contributing to the profit earned by diminishing the expense of working the whole traffic on the line, while here it was the traffic over the branch that earns the profit on the main line.

Field, in reply.

MELLOR, J. It is not very easy, and I do not attempt to reconcile all that has been said in the various cases on the subject of assessing to the poor-rate branch lines of railway, or lines contributing to the traffic or feeding of other lines. It appears to me to be immaterial whether the line be a branch or a main line. The true principle on which the rate ought to be made is by ascertaining what is the rateable value in each particular parish through which the railway passes, and that is to be based on what a hypothetical tenant would give for the line in that particular parish. The question we are asked is, whether the fact that the railway in the parish of Llantrissant contributes additional traffic to the Great Western Railway is to cause it to be rated to something in addition to the profit which the railway itself earns. This question is decided in principle by the *Haughley Case* (1), and I abide by what I said in that case. I think it must be taken that the Lord Chief Justice in the *Haughley Case* (1) did not quite adhere to the suggestion he threw out in the *Cannock Case.* (2) I do not believe there was any difference of opinion between us in the *Haughley Case* (1), and certainly what I expressed in that case I

(1) Law Rep. 1 Q. B. 666.

(2) *London and North Western Railway Company* v *Cannock*, 9 L. T. 325.

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abide by in the present case, that the rateable value in each parish of a line of railway passing through several parishes must depend on the actual earnings of the part of the railway within the particular parish, deducting the actual expenses of that part. Some difficulties have been introduced by confounding the hypothetical tenant with the actual tenant; it is not because a particular tenant will give a large sum as rent that that is any criterion of the rateable value. The simple question is, whether or not because the traffic that passes over the parish of Llantrissant gets on to the Great Western Railway, and thereby enhances the traffic of the Great Western Railway, any additional sum is to be allowed to the parish of Llantrissant? Putting the question in that simple form, I can give but one answer to it, that no addition ought to be made; and I think therefore the order of sessions must be confirmed.

HANNEN and HAYES, JJ., concurred.

Order of sessions confirmed.

Attorneys for appellants: *Young, Maples, & Co.*

Attorneys for respondents: *Wrentmore & Son, for Spickett & Price, Pontypridd.*

April 24.

THE QUEEN *v.* THE METROPOLITAN BOARD OF WORKS.

Lands Clauses Consolidation Act, 1845 (8 *Vict. c.* 18), *s.* 68—*Compensation—Injury to Land—Obstruction to a Public Right.*

The principle of the decision of the House of Lords in *Ricket* v. *Metropolitan Railway Company* (Law Rep. 2 H. L. 175) is, that in order to entitle a claimant to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, the injury must be done to land or some interest in land, and a mere personal injury, though connected with the enjoyment of particular land, is not ground for compensation.

Therefore, where the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw dock, as public rights, and not as rights attached to the premises, and was obstructed in the enjoyment of these rights by the works of the embankment:—

Held, that he could not claim compensation under s. 68.

RULE, calling on W. & C. Batstone to shew cause why a certiorari should not issue to bring up an inquisition verdict and judgment taken before the sheriff of Surrey touching the claim made

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by the Batstones against the Metropolitan Board of Works, in respect of their interest in a certain messuage, tenement, and hereditament, called "Pottery No. 5," situate in Ferry Street, Lambeth, having been injuriously affected by the execution of the works of the board, in order that the same might be quashed.

The facts, as disclosed upon the affidavits, were as follows:

The Metropolitan Board were empowered by 26 & 27 Vict. c. 75, to make an embankment on the south side of the Thames. The act incorporates (s. 15) the Lands Clauses Consolidation Act, 1845. W. & C. Batstone carried on the business of potters at a place called "Pottery No. 5" in Ferry Street, Lambeth. On the 3rd of July, 1867, they caused a notice to be served on the board, stating that the premises in their occupation in Ferry Street had been and were injuriously affected by the exercise by the defendants of the powers given to them by the above Act, and claiming 4000*l.* as compensation. As no part of the claimants' premises was taken for the works of the embankment, nor was any right or easement of the claimants interfered with, the defendants were not willing to pay compensation; they therefore, under protest, issued their warrant to the sheriff to summon a special jury to determine the amount of compensation to be paid to the claimants.

At the inquisition taken on the 24th of October, 1867, it was admitted that Ferry Street runs at right angles with the Thames, and that the claimants' premises are situate some seventy yards away from the river up that street. That Broad Street is the next street to Ferry Street on the east side, running parallel with it, and also at right angles with the river, and that High Street runs parallel with the river, joining Ferry Street at its west end, and Broad Street at its east. It was also admitted that at the end of Ferry Street, where it goes down to the river, there was a common and public right from time immemorial for all persons freely to dip for and take water from the river for their own use without payment, and that there was a right of way or access to the river for that purpose. It was further admitted that at the end of Broad Street, where it goes down to the river, there was a free public draw dock, and that all the public had a right to resort to and use this dock, and to take carts there, backwards and forwards, to load and unload barges, and that barges had a right to lie and be there, and

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this right was free to all the public. It was proved that in the construction of the works of the embankment which were then in progress the defendants had caused the embankment to be erected in front of the spot in Ferry Street where the public right to take water was exercised, and that since the works were commenced in that spot the access to the river there by the public had been practically cut off, so that the right to take water could not be exercised as before; and it was suggested that this deprivation would continue until the embankment works were completed at that spot. It was also proved that at the draw dock at Broad Street only one or two barges could now be got up to load or unload instead of four or five as formerly, and that the access to the dock by barges was attended with difficulty and danger. There was no direct evidence whether the obstruction was permanent or not.

The claimants, in carrying on their business of potters on their premises, had been in the habit of sending and dipping for and fetching water from the river at Ferry Street to use in their business, and also had been used to have the sand used in their business brought by barges to the draw dock at Broad Street. They proved that since the commencement of the embankment works they had been prevented by the works from obtaining access to the river for these purposes, and they founded their claim to compensation, first, for having been deprived of the use of their right to dip and get water, and, secondly, for having been deprived of the use of the right to bring barges to the draw dock.

It was admitted that there was no right or easement appurtenant to the claimants' premises to go to the river to dip or get water, or to use the draw dock.

The jury assessed the amount of compensation on the first head of damage at 50*l.*, and on the second head at 40*l.*

Montagu Chambers, Q.C., and *Bridgman*, shewed cause. The claimants are entitled to compensation. *Ricket* v. *Metropolitan Railway Company* (1) will be relied upon by the other side, but that case only decided that where the obstruction was not permanent the party injured has no claim to compensation. The reasoning of Lord Westbury in that case is in favour of the claimants. If the

(1) Law Rep. 2 H. L. 175.

premises are damnously affected so that the person living there suffers a loss, they are injuriously affected within the meaning of the statute. Here the claimants' trade has suffered, and were it not for the statute they could have maintained an action. Upon that point the authorities are clear. Where a highway is obstructed, and a person using it suffers a pecuniary loss, *Rose* v. *Miles* (1), *Greasly* v. *Codling* (2), shew that an action will lie. It has also been decided that damage of an indirect nature entitles the person suffering it to compensation; so that if a road was lowered, as in *Reg.* v. *Eastern Counties Railway* (3), or if there is a deviation, as in *Chamberlain* v. *West End of London and Crystal Palace Railway Company* (4), or a narrowing of the road, as in *Beckett* v. *Midland Railway Company* (5), in all these cases the party injured would be entitled to compensation. There is no difference between narrowing or altering a road and the obstructions by which the claimants are injured.

Parry, Serjt., and *Philbrick*, in support of the rule. The claimants' land is not, nor is any interest therein, injuriously affected within the meaning of s. 68. If before this enactment a claimant could not have supported an action, he cannot since its passing be entitled to compensation; and, moreover, it does not follow that in every case where a claimant could have brought an action he can have compensation; he can only have compensation where he could have brought his action for an injury to land, and not for a mere injury to a personal benefit. The claimants suffer an inconvenience with the rest of the public. If they are entitled to compensation, every body is entitled to compensation. *Winterbottom* v. *Lord Derby* (6) is an express authority that the claimants could not have brought an action, and *Ricket* v. *Metropolitan Railway Company* (7) that they are not entitled to compensation.

MELLOR, J. I think we are bound to give our judgment for the defendants on the authority of *Ricket* v. *Metropolitan Railway Company*. (7) Although the decision in that case was given on a particular state of facts, we must be guided by the reasons on which

(1) 4 M. & S. 101.
(2) 2 Bing. 263.
(3) 2 Q. B. 347.
(4) 2 B. & S. 605; 32 L. J. (Q.B.) 173.
(5) Law Rep. 3 C. P. 82.
(6) Law Rep. 2 Ex. 316.
(7) Law Rep. 2 H. L. 175.

8 Jur. N.S. 935; 9 Jur. N.S. 1051.

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it was based. Had the case been open to appeal, the dissent of Lord Westbury, and the reasons urged by him for not agreeing with the judgment of the majority of the Lords, would have much diminished the weight of that authority; but as the decision of the Court of ultimate appeal, whatever our opinion may be, it is binding on all courts, and we must adopt it.

Now, was it in reality the decision of the House of Lords, that unless there was an injury to land, as distinct from a personal injury, the claim for compensation could not be maintained? The words of s. 68 are "land, or any interest in land, injuriously affected." A man may live in a particular house, and many cases can be suggested in which he may suffer a considerable injury, but unless the injury is to the house or to some interest in the house, such as a right of way, or rights similar to those referred to in the judgment of Lord Cranworth (1), it is clear that, according to the opinion of that noble and learned lord, there could be no compensation, because there would have been before the statute no action in respect of any injury to the land on which the house stands. I believe many of the cases cited by Mr. Chambers shew that where a man suffers a personal injury distinct from that which any one of the public suffers he may have an action; but then that is an action for a personal injury. It is not because he carries on a trade in a particular house, and, owing to an unlawful act, the profits arising from that trade are diminished, that the injury can be said to be done to the house; the injury is done to him personally, and it would be confounding the distinctions which have hitherto prevailed to hold otherwise. But, undoubtedly, Lord Westbury goes quite as far as the argument of Mr. Chambers, because he says (2): "When the general railway acts use the term 'injuriously affected,' the word 'injuriously' does not mean 'wrongfully' or 'unlawfully,' nor does it imply that compensation is limited to cases where the act done is such as, but for the powers given, would be a tort at common law. The words mean 'damnously affected' only; and the consequential right to compensation is the creature of the statutes, to be ascertained and measured by the positive language of the enactments, and not by analogy to actions of tort or trespass. There is nothing in the

(1) Law Rep. 2 H. L. at p. 198. (2) Law Rep. 2 H. L. at p. 202.

statutes to warrant the position that there shall be no compensation where at common law there would have been no right of action." I quote that passage to shew on what Lord Westbury's opinion was based. It was not on the special circumstances of that case, but upon the general construction of the statutes that he proceeded. The other two noble and learned lords entirely differed in that respect. Lord Chelmsford says (1): "I think that the criterion of a party's right to damages under the clauses of the Railway and Companies Acts, upon which this case depends, is correctly stated by Lord Campbell in *Re Penny and South Eastern Railway Company* (2), and that, in his words, 'unless the particular injury would have been actionable before the company had acquired their statutory powers it is not an injury for which compensation can be claimed.' At the same time, the observation of my noble and learned friend Lord Cranworth, in the case of *Caledonian Railway Company* v. *Ogilvy* (3), must not be lost sight of, that 'it does not follow that a party would have a right to compensation in some cases in which, if the act of parliament had not passed, there might have been not only an indictment, but a right of action;'"—clearly shewing that when we use the words "actionable right" it must mean an actionable right in respect of some injury to land; it must not be an actionable right independently of occupation of land, but connected with land. That is the opinion, therefore, of Lord Chelmsford. Lord Cranworth says (4): "Both principle and authority seem to me to shew that no case comes within the purview of the statute, unless where some damage has been occasioned to the land itself, in respect of which, but for the statute, the complaining party might have maintained an action. The injury must be actual injury to the land itself, as by loosening the foundation of buildings on it, obstructing its light or its drains, making it inaccessible by lowering or raising the ground immediately in front of it, or by some such physical deterioration. Any other construction of the clause would open the door to claims of so wide and indefinite a character as could not have been in the contemplation of the legislature." Therefore each of these noble and learned lords bases his argument, not upon

(1) Law Rep. 2 H. L. at p. 187.
(2) 7 E. & B. 660; 26 L. J. (Q.B.) 225.
(3) 2 Macq. at p. 235.
(4) Law Rep. 2 H. L. at p. 198.

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the mere question of the distinction between a temporary and a permanent obstruction, but upon the construction of the statute; and it appears to me that that being the substantive ground on which their opinion proceeded, it is a decision which conclusively binds inferior courts in all cases depending on the construction of the statute.

This consideration renders it unnecessary to go through the arguments, or refer to the cases which were cited by Mr. Chambers independently of the statute, as to what is an actionable personal injury. The injury here is of a personal nature, and one for which no claim for compensation could be maintained under s. 68, which gives it only in respect of land or some interest in land which may be injuriously affected.

HANNEN, J. I am of the same opinion. I think it is our duty to extract from the case of *Ricket* v. *Metropolitan Railway Company* (1) the principle upon which the decision is based. It seems to me that it is correctly expressed in the second clause of the head note: "No case comes within the purview of the 68th section of the Lands Clauses Act, or the 6th section of the Railways Clauses Act, unless in respect of damage to the land itself, which damage would have been the subject of an action at law before those statutes." So that those two things must concur, not only that it would have been the subject of an action before the statute, but of an action in respect of damage to the land itself or some interest therein.

Now in this case it appears to me to be plain that the damage complained of is not an injury to the land, or any interest therein; and we must, therefore, give judgment for the defendants, unless we are to adopt the very powerful reasoning of Lord Westbury. But that was not adopted by the majority of the House of Lords, and must be disregarded. The stronger that reasoning may be, the more clear is it that the noble and learned lords, whose judgment has now become the law of the land, were opposed to that line of reasoning which Mr. Chambers has pressed upon us. They have laid down clearly the principle which I have quoted, and it would be unbecoming in us to express any disapprobation of it.

(1) Law Rep. 2 H. L. 175.

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That, consequently, must guide us to-day, and it appears to me entirely to dispose of this case.

HAYES, J. I quite agree upon the same grounds. The case does not seem open to argument, as far as this Court is concerned, after carefully looking through the reasons given, and what the decision was, in the case of *Ricket* v. *Metropolitan Railway Company*. (1) The particular case we have to determine here seems to be decided by two cases which have been referred to—one as to public rights and the other as to private rights—and they illustrate extremely well the difference between a public and a private right. In *Glover* v. *North Staffordshire Railway Company* (2), it was held by this Court upon consideration, that the crossing by a level crossing of a private road belonging to the owner of a house was an interruption to the interest appurtenant to the house, and therefore it was an injury to the land, and would come under the 68th section. In the other case which was relied upon, the injury was quite as great, but the nature of the right varied. *The Caledonian Railway Company* v. *Ogilvy* (3) was an action for damage by a level crossing over a highway close to the lodge of a gentleman's house; every time he went out his horses were likely to be frightened by the trains passing, and he was thus liable to accidents. It was held that that was an injury to a public right, and that was the ground of distinction taken. The right of taking water in this case is like the right of the public to a road. All the Queen's subjects have a right to go and take the water, but it so happens that the claimants, because they live near, use it more frequently than others, but others have the same right to use it. *Rex* v. *Bristol Dock Company* (4) seems to me also to be in point. However, independently of any other authority, *Ricket* v. *Metropolitan Railway Company* (1) is binding upon us, and therefore the rule must be made absolute.

Rule absolute.

Attorney for claimant: *Berry Hutchinson.*
Attorney for defendants: *W. W. Smith.*

(1) Law Rep. 2 H. L. 175.
(2) 16 Q. B. 912; 20 L. J. (Q. B.) 376.
(3) 2 Macq. 229.
(4) 12 East, 429.

1869
May 10.

HUDSTON *v.* THE MIDLAND RAILWAY COMPANY.

Carriers by Railway—Passengers' Luggage—Words "Ordinary or Personal Luggage"—Child's Plaything.

Those articles only, which travellers usually carry with them as part of their luggage, come within the definition of "ordinary" or "personal" luggage, which a railway company is bound to carry with a passenger free of charge.

A railway company refused to carry a "spring horse" for a child to ride on, weighing 78 lbs. and measuring 44 inches in length, tendered to them by a passenger, who was entitled to take with him 112 lbs. weight of "ordinary" or "personal" luggage:—

Held, that the spring horse was not "ordinary" or "personal" luggage, and that the company were justified in refusing to carry it free of charge.

APPEAL from the decision of the County Court of Derbyshire, holden at Derby.

The plaintiff sought to recover 2*s.* 6*d.*, being the amount paid by him to the defendants, under protest, at King's Cross station, for carriage charged by them from London to Beeston, near Nottingham, of a toy called a "spring horse," weighing 78 lbs., and 2*l.* 2*s.* for damages, for detention in London, expenses, and business loss, in being prevented from attending to letters at Nottingham.

On the hearing it was proved that the plaintiff, on the 10th of March, 1868, took a first class return ticket from Beeston, near Nottingham, to King's Cross. He took no luggage with him, but while in London bought a child's toy called a "spring horse" (an improvement on the old rocking horse, but standing on a flat surface, and about 44 inches in length), which was sent to the King's Cross station in time for him to take with him on his return to Beeston by the train which left at three o'clock in the afternoon. When the plaintiff arrived at the station the defendants refused to allow it to be taken as luggage, it being an article for the carriage of which they had a regular and fixed charge of 2*s.* 6*d.*

The plaintiff objected to this charge, alleging that as a first class passenger he was entitled by their rules and regulations to carry 112 lbs. weight of personal luggage free; that the toy in question only weighed 78 lbs., and that the same was for use in his family; that it was not merchandise in his hands. The de-

fendants persisted in their charge, which the plaintiff refusing to pay, the train was dispatched without him. The plaintiff ultimately paid the 2*s.* 6*d.* under protest, and thereupon both he and the spring horse were forwarded by the 5·35 train, which was the next train leaving King's Cross for Beeston.

On the railway ticket issued to the plaintiff there was the following printed:—"This ticket is issued subject to the regulations and conditions stated in the company's time tables and bills." The following are the regulations referred to so far as concerns the matter in question: "Luggage: First class passengers are allowed 112 lbs., second class 100 lbs., and government passengers 56 lbs. of personal luggage only (not being merchandise or other articles carried for hire or profit) free of charge, all excess of luggage above the weight allowed will be charged for according to distance." (1)

Judgment was given for the defendants, but the judge granted the plaintiff leave to appeal.

The plaintiff contends, that according to the terms of the defendants' contract with him, as set forth on the ticket and in the time tables and bills published by the defendants, he was entitled as a first class passenger to take the spring horse in question with him, and have the same carried as his personal luggage free of charge, it being under the allowed weight, and not within the restriction in the defendants' bills of "merchandise or other articles carried for hire or profit." The defendants have a fixed tariff for excepted articles, but that tariff does not appear in their acts or public time tables.

The defendants contend that the spring horse did not come within the meaning of the words "personal luggage," inasmuch as it was not for the plaintiff's personal use and convenience as a traveller, but was an article for the carriage of which they were entitled to charge, according to their usual custom and that of other railway companies.

The question for the opinion of the Court was, whether the plaintiff was entitled to take with him the spring horse free of

(1) There is a slight difference between the words of the regulation and the private act of the company. 7 Vict. c. xviii. s. 204, enacts: "That every passenger travelling upon the railway in a first class carriage may take with him his 'ordinary luggage,' not exceeding 100 lbs. in weight . . . . without any charge being made for the carriage thereof."

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charge, or whether the defendants were entitled to charge for the carriage of it.

Macnamara, for the plaintiff. The "spring horse" is personal luggage within the meaning of the defendants' regulations; those regulations must be construed liberally in favour of travellers, and here they mean something beyond mere wearing apparel or things carried for use on a journey; on a fair construction of the words, everything not merchandise, nor carried for hire or profit, is personal luggage. A cricketer's bat, a fisherman's rod, a sportsman's gun, or books carried for instruction or amusement, and even a thing intended as a present (provided it does not exceed the weight allowed), all come within the definition of personal luggage. There is no case in point, but the question has been incidentally discussed both in the English and American courts. In *Great Northern Railway Company* v. *Shepherd* (1) Parke, B., says: "Luggage, according to the true modern doctrine on the subject, comprises clothing and such articles as a traveller usually carries with him for his personal convenience; perhaps, even, a small present, or a book for the journey, might be included in the term." It is quite clear that merchandise is not within the term: *Cahill* v. *London and North Western Railway Company* (2); *Keys* v. *Belfast and Ballymena Railway Company* (3); nor would things belonging to a third person be a passenger's personal luggage: *Phelps* v. *London and North Western Railway Company* (4); but in that case (5) Erle, C.J., says: "It is impossible to draw a definite line. Luggage which one person might carry for his personal use might be a distress and annoyance to another." In Angel on Carriers (s. 115) it is laid down: "All articles which it is usual for persons travelling to carry with them, whether from necessity or for convenience or amusement (such as a gun or fishing tackle) fall within the term baggage." So in Story on Bailments, s. 449, it is stated: "But by luggage we are to understand such articles of necessity or personal convenience as are usually carried by passengers for their personal use, and not mer-

(1) 8 Ex. at p. 38.
(2) 13 C. B. (N.S.) 818; 31 L. J. (C.P.) 271.
(3) 9 H. L. C. 556.
(4) 19 C. B. (N.S.) 321; 34 L. J. (C.P.) 259.
(5) 19 C. B. (N.S.) at p. 331; 34 L. J. (C.P.) at p. 261.

chandise. . . . ." And in a note to the seventh edition of that work all the American authorities are collected; and it is stated to be impossible to define accurately what is personal luggage. The article in the present case is a child's toy, which the plaintiff is taking home as a present to his child, and personal luggage means not only things carried by a passenger for his own use, but for the use of his family.

Wills (*J. C. Carter* with him), for the defendants. To call this "spring horse" personal luggage is to go beyond every definition that has been given of personal luggage. It is not luggage in any sense, it is an article of furniture for the nursery; it is not a thing a traveller takes about with him, but one which goes to a man's house once for all, and remains there. It is impossible to give an accurate definition of what is "luggage;" it shifts with the customs and habits of society. This article could not be packed as luggage is usually packed; and if railway companies are bound to carry such things, they would have to provide additional accommodation, and would incur additional responsibilities and unreasonable and illimitable risks. It may be that all the definitions hitherto laid down with respect to personal luggage are inaccurate, but this spring horse is an exceptional thing, and can in no sense be said to be personal luggage. The defendants are no more bound to carry it than they are to carry a chair or a table.

[LUSH, J. The bye-law uses the term "personal luggage;" is there any Act of Parliament which defines how much and what luggage the defendants are bound to carry with a first class passenger?]

The defendants' private act, 7 Vict. c. xviii. s. 204, provides that every passenger travelling upon the railway in a first class carriage may take with him his ordinary luggage not exceeding 100 lbs. in weight . . . . without any charge being made for the carriage thereof. It cannot be said that the spring horse is "ordinary" luggage.

[HANNEN, J. The case finds that the passenger is carried on a contract which restricts him to 112 lbs. of "personal" luggage.]

Macnamara, in reply.

LUSH, J. I am of opinion that the judgment of the county court judge must be affirmed. It must be taken that the company

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intend, by their regulation, to express the same thing as is expressed by their Act, although they use different words. Their regulation is that first class passengers are allowed 112 lbs. of "personal luggage," not being merchandise or other articles carried for hire or profit, free of charge. Now, it is not difficult to define what is within the exception. The privilege does not extend to articles of merchandise—that is, articles carried for the purpose of sale—nor to articles carried for hire or profit—that is to say, where a person makes a profit from the carriage of them—although the articles may be of a description otherwise falling within the meaning of the term "personal," or, to take the language of the statute, "ordinary luggage." But it is extremely difficult to frame a definition in terms which shall embrace all that is intended to be brought within the regulation, and exclude all that is intended to be excluded. I cannot say that I am satisfied with any of the definitions which have hitherto been given. They have been quite enough for the cases in which they have been pronounced, but it does not appear to me that any of them are perfect. But it is very difficult, perhaps impossible, to frame a definition which shall be precise enough for all purposes; at all events, I think the meaning put upon this regulation by the railway company themselves is too narrow, because they contend that the words "personal luggage" embrace only those things which are carried for the personal use and convenience of the traveller himself. I do not think that the words ought to be so limited. The statute speaks of "ordinary luggage;" it must have been intended that the passenger should be allowed to carry something more than that which he requires for his own personal use and convenience. The only definition I can think of, and one which is sufficient for this case, is, that the words of the statute describe a class of articles which are ordinarily or usually carried by travellers as their luggage. That definition must also be taken to apply to the company's regulation, because when the company were fixing the description of goods for which they would consider the passenger had paid the carriage when he paid for his ticket, they must have had regard to the usual habits of mankind, and to that description of goods which is usually carried by passengers travelling.

The particular thing in question here, I think, goes beyond that

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limit. It is an article which is called a child's toy; but, certainly, a thing of this description cannot properly be called a child's toy. It is a spring horse, a substitution for a rocking horse, weighing 78 lbs., and measuring 44 inches in length. It does not, to my mind, come within the description of a toy, because the word toy gives one the idea of something which can be carried in the hand.

I think we must confine the definition of personal luggage in the sense that I have mentioned, namely, to that description of goods which passengers usually carry as part of their luggage. Our judgment must, therefore, be for the defendants.

HANNEN and HAYES, JJ., concurred.

Judgment for the defendants.

Attorney for plaintiff: *Hogg.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

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April 29.

Writ of Restitution—Jurisdiction of Court of Queen's Bench—21 *Hen.* 8, *c.* 11; 24 *&* 25 *Vict. c.* 96, *s.* 100.

The Court of Queen's Bench had at common law no jurisdiction to issue a writ of restitution except as part of the judgment on an appeal of larceny; and 21 Hen. 8, c. 11, and 24 & 25 Vict. c. 96, s. 100, only confer this jurisdiction on the Court before whom the felon has been convicted.

Where, therefore, a person has been convicted of housebreaking and larceny before the Central Criminal Court, the Court of Queen's Bench has no power to award a writ of restitution of the proceeds of the larceny.

RULE, calling upon the lord mayor, commonalty, and citizens of the city of London to shew cause why a writ of restitution should not issue to restore to John Walker certain moneys amounting to the sum of 270*l.*, the proceeds of the sale of certain goods stolen from Walker between the night of Saturday and the morning of Monday, the fourth and sixth days of February, 1865.

It appeared from the affidavits that John Walker carried on the

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business of a watchmaker and jeweller in the city of London, and his shop and premises were broken open at the date mentioned in the rule, and a large quantity of watches and gold chains was stolen. Certain persons were afterwards convicted of the felony at the Central Criminal Court before the Recorder. In the possession of one of the prisoners were found fifty-four watches and also certain gold chains, a part of the stolen property, and 270*l.* in cash. It was stated on behalf of John Walker that this sum of 270*l.* was the proceeds of the residue of the property stolen from him; but this was denied on the part of the corporation. On the conviction the Recorder made an order for the restitution of the watches and gold chains, but declined to order the sum of 270*l.* to be given up to Walker. The corporation of London, under certain charters, claimed the money as being the goods and chattels of felons convicted within the city of London, and the sum was accordingly paid over to the corporation.

The statutes relied on by the applicant were 21 Hen. 8, c. 11, and 24 & 25 Vict. c. 96, s. 100. (1)

(1) 21 Hen. 8, c. 11, enacts that:—"If any felon or felons hereafter do rob or take away any money, goods, or chattels from any of the king's subjects, from their person or otherwise within this realm, and thereof the said felon or felons be indicted and after arraigned of the same felony and found guilty thereof or otherwise attainted by reason of evidence given by the party so robbed, or owner of the said money, goods, or chattels, or by any other by their procurement, that then the party so robbed or owner shall be restored to the said money, goods, and chattels; and that as well the justices of gaol delivery as other justices before whom any such felon or felons shall be found guilty or otherwise attainted by reason of evidence given by the party so robbed or owner, or by any other by their procurement have power by this present act to award from time to time writs of restitution for the said money, goods, and chattels in like manner as though any such felon or felons were attainted at the suit of the party in appeal."

Appeals of felony were abolished by 59 Geo. 3, c. 46. 21 Hen. 8, c. 11, was repealed by 7 & 8 Geo. 4, c. 27. 7 & 8 Geo. 4, c. 29, s. 57, enacted that, "if any person guilty of any felony or misdemeanour as aforesaid in stealing, taking, obtaining, or converting, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for any such offence by or on behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and the Court before whom any such person shall be so convicted, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner." 7 & 8 Geo. 4, c. 29, was repealed by 24 & 25 Vict. c. 95.

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Mellish, Q.C. (*Archibald* with him), shewed cause. This Court has no power to issue a writ of restitution in this case. At common law there was no restitution of goods upon an indictment, because it was at the suit of the king only, and therefore the person whose goods were stolen in order to recover them was obliged to prosecute an appeal of robbery. The appeal of robbery is abolished by 59 Geo. 3, c. 46, and as a consequence the writ of restitution has gone with it. The 21 Hen. 8, c. 11, merely empowered the Court in which the offender was convicted to award a writ of restitution, and gave no original jurisdiction to the Court of Queen's Bench. The later statutes, though they apply to a larger number of offences, do not confer any additional power on this Court.

Sir J. D. Coleridge, S. G., and *Crompton Hutton*, in support of the rule. It is admitted that at common law this Court could not award a writ of restitution after conviction upon an indictment. The statute law has given the remedy sought. The goods in the possession of a felon become forfeited to the king. The first part of 21 Hen. 8, c. 11, therefore, enacted that they should be restored to the owner; that is, the property therein should vest in him, and it follows from that the Court of Queen's Bench has jurisdiction to award restitution; the second portion enacts that the court before whom the offender is tried may, likewise, in a summary way, award a writ of restitution: this latter provision is merely cumulative to the former, and in no way limits its operation. It was a

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24 & 25 Vict. c. 96, s. 100, enacts that, "if any person guilty of any such felony or misdemeanour as is mentioned in this Act in stealing, taking, obtaining, extorting, embezzling, converting, or disposing, or in knowingly receiving any chattel, money, valuable security, or other property whatsoever, shall be indicted for such offence by or on behalf of the owner of the property or his executor or administrator, and convicted thereof, in such case the property shall be restored to the owner or his representative; and in every case in this section aforesaid the Court before whom any person shall be tried for any such felony or misdemeanour, shall have power to award from time to time writs of restitution for the said property, or to order the restitution thereof in a summary manner."

By s. 1 it enacted that "the term property shall include not only such property as shall have been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise."

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remedial statute, and must receive a liberal construction. It is true the appeal of larceny is abolished, but while it existed it could only be prosecuted in this Court, and the writ of restitution which still exists must therefore be applied for here. (1) The statutes 7 & 8 Geo. 4, c. 29, s. 57, and 24 & 25 Vict. c. 96, s. 100, were passed to extend and not to abridge the rights of the subject, and must receive the same construction.

Archibald referred the Court to the following authorities: *Golightly* v. *Reynolds* (2); *Reg.* v. *Macklin* (3); *Scattergood* v. *Silvester.* (4)

MELLOR, J. We are all of opinion that the rule should be discharged. I think that the only effect of 21 Hen. 8, c. 11, was to give to a person proceeding by indictment the right to have his goods restored to him in a summary manner, and it did not extend the jurisdiction then exercised by the King's Bench in proceedings by way of appeal. The justices to whom the power to award writs of restitution is given by that statute, are specially mentioned in it. They are as well justices of gaol delivery as other justices afore whom any such felon shall be found guilty. Under that statute an application for restitution might be made to these justices, and the effect of such an application, if granted, was identical with a writ of restitution awarded by the King's Bench on a judgment in an appeal of larceny. Up to the end of the reign of George III. appeals of larceny, although obsolete, might have been prosecuted; but after the passing of 59 Geo. 3, c. 46, the jurisdiction of this Court at common law to award a writ of restitution was abolished, for it had no power to issue it, except as part of the judgment in proceedings by appeal, just as on a conviction for a continuing nuisance, a writ of abatement is awarded as part of the judgment. The succeeding statutes extend the remedy to other offences, not mentioned in the first Act, but they do not confer any jurisdiction on the Court of Queen's Bench to issue a writ of restitution on a conviction of the offender in another court. We have, therefore, no power to issue the writ, and the rule must be discharged.

(1) Mellish pointed out that in Vin. Abr. Appeal (H.) it was stated that appeal was brought before the justices at Newgate, of robbery, &c., and so note that appeal lies well before the justices of gaol delivery, and so it is often used.

(2) Lofft, 88.

(3) 5 Cox, C. C. 216.

(4) 15 Q. B. 506; 19 L. J. (Q.B.) 447.

LUSH, J. I am of the same opinion. At common law this Court had no jurisdiction to issue a writ of restitution, it merely had the power to award it as part of its judgment in proceedings by appeal, if the goods stolen were produced and their identification established. I cannot find any words in 21 Hen. 8, c. 11, which lead me to suppose that the legislature intended, for the first time, to confer upon this Court a jurisdiction to award a writ of restitution apart from any such proceeding. I do not agree with the construction put upon the 21 Hen. 8, c. 11, by the Solicitor-General; the first part of it declares that the person whose goods are stolen shall have an absolute title vested in him which he may enforce by action at law, the second part points out a specific remedy upon which the Court before which the offender is convicted may act.

HANNEN, J. I am of the same opinion. I think the language of 24 & 25 Vict. c. 96, s. 100, must be construed by that of 21 Hen. 8, c. 11. The first part of the latter statute enacts that the person whose goods are stolen shall have them restored, which object he might attain by pursuing certain remedies which the law then gave him; he might either sue in an action at law, or take proceedings by appeal, which would result in a writ of restitution; but then the statute goes on to confer the additional advantage of a summary remedy where conviction has been obtained on an indictment. Therefore, the prosecutor on an indictment has the same benefit as if he had prosecuted his appeal. It follows from that, that if the person robbed desired to obtain a writ of restitution otherwise than by the summary remedy, he must proceed by an appeal. Appeals of felony are abolished, but the 24 & 25 Vict. c. 96, s. 100, uses nearly the same words as the earlier statute,—"The property shall be restored to the owner or his representative." The Solicitor-General contends that these words mean that the property shall be restored by a writ of restitution awarded by this Court. I think it perfectly clear that the legislature could not have intended that, or they would have enacted it in express terms: for in a subsequent part of the section a writ of restitution is specially mentioned. I think that the only meaning of these words is, that the right to the property stolen shall vest in the

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owner or his representative, and that he shall have a particular remedy granted by the Court before which the conviction is obtained, either by writ of restitution or by restitution in a summary manner. The procedure by appeal has been taken away, and there is no power in this Court to award restitution on a judgment obtained in another court.

Rule discharged.

Attorneys for applicant: *Field, Roscoe, & Co.*
Attorney for defendants: *The City Solicitor.*

May 4.

DIGNAM *v.* BAILY.

Debtor and Creditor—Sheriff—Escape—Certificate of Registration of Deed—A running Bill of Exchange a debt barred by Deed under Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 197, 198.

B. executed a deed of composition under the Bankruptcy Act, 1861, containing a release by the creditors, which was registered immediately; at this time a bill drawn by C. and accepted by B. was running. The bill was indorsed to the plaintiff after it became due; the plaintiff sued B. on the bill and obtained judgment against him, and the sheriff, having arrested B. on a ca. sa., discharged him on the production of the certificate of registration of the deed. The plaintiff having brought an action against the sheriff for an escape, the sheriff pleaded the certificate as a justification, to which the plaintiff replied that the plaintiff's cause of action accrued after the registration of the deed, and the plaintiff was not a creditor bound by the deed; on issue joined:—

Held, that the plaintiff's debt was barred by the deed, and the certificate therefore was a justification to the sheriff in discharging B.

Quære, if the pleadings had raised the question, whether the certificate protected the sheriff: as B. having had an opportunity of pleading the deed, could not avail himself of the certificate as a protection.

DECLARATION that the plaintiff, on the 11th of December, 1866, obtained judgment against one Thomas Brassington, that a ca. sa. was sued out and delivered to the defendant, as sheriff of Kent, commanding him to arrest Brassington to satisfy the plaintiff's debt and interest from the 11th of January, 1866, on which day judgment was entered up; that the defendant arrested Brassington, and afterwards allowed him to escape.

Pleas: 1. Not guilty. Issue thereon.

2. That after the defendant's officer had taken Brassington in

SC as to costs 5 E B 54

execution, Brassington produced to the officer, and gave him a copy of, the certificate from the court of bankruptcy of the due registration of a deed made and executed between Brassington and his creditors, within the meaning of s. 198 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134), whereupon the defendant's officer released Brassington from custody.

Replication: That the plaintiff's cause of action against Brassington, in respect of which the judgment was recovered, first accrued after the making and after the registration of the deed, and the plaintiff was not a creditor of Brassington in respect of the said cause of action when the deed was made, nor when the same was produced and left for registration, nor until after the certificate was granted; and the ~~defendant~~ was not one of the creditors referred to or intended to be bound by the deed.

Issue thereon.

At the trial before Mellor, J., in the sittings in London after Easter Term, 1868, it appeared that the plaintiff had commenced an action against Thomas Brassington on the 27th of November, 1866, on a bill of exchange, dated the 17th of April, 1866, drawn at three months, by one Clayton to his own order, on and accepted by Brassington; the bill became due on the 20th of July, and was endorsed by Clayton to the plaintiff after maturity. On the 20th of June Brassington had executed a deed of composition under the Bankruptcy Act, 1861, which was duly registered immediately. The deed was for a composition of 5*s.* in the pound, by two equal instalments within three and six months of the date, and contained a covenant by Brassington to pay the instalments, with an absolute release by the creditors of their respective debts. Brassington, however, did not plead the deed, and judgment was signed on the 11th of December for 20*l.* 9*s.* 9*d.*, debt and interest, and 3*l.* 8*s.* costs. A ca. sa. was issued for the amount, and delivered to the officer of the present defendant, the sheriff of Kent; and the officer having arrested Brassington on the 15th of December, discharged him on his producing and handing over a copy of the certificate of registration of the deed.

A verdict was directed for the plaintiff for 23*l.* 17*s.* 9*d.*, the amount indorsed on the ca. sa., with leave to move to enter the verdict for the defendant.

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A rule was obtained accordingly, on the ground that the debt, in respect of which the judgment was obtained, was a debt to which the deed related, and which was barred by the deed; and that the certificate of the deed was a sufficient justification to the defendant in discharging Brassington from custody.

D. Seymour, Q.C., shewed cause. This very case, on demurrer (1), decided that in order to make the certificate a protection, the debt in respect of which the debtor is arrested must be barred by the deed; here the bill was not due, and was not indorsed to the plaintiff till after the deed was executed. But assuming the plaintiff's debt to be barred by the deed, Brassington had an opportunity of pleading it and did not, therefore he cannot avail himself of the protection of s. 198: *Rossi* v. *Bailey*. (2)

THE COURT then called upon

Raymond, in support of the rule. First, the plaintiff's debt was barred by the deed. The plaintiff took the bill after it was due. The bill, though running, would have been proveable under a bankruptcy by s. 172 of 12 & 13 Vict. c. 106; and therefore would have been discharged by the order of discharge under ss. 161 and 162 of 24 & 25 Vict. c. 134; and s. 197 of that Act puts all parties under a deed of composition in the same position as if there had been an adjudication in bankruptcy. By s. 198, the certificate is available as a protection in bankruptcy; and therefore, inasmuch as if arrested for the debt the bankrupt would have been entitled to his discharge under s. 113 of 12 & 13 Vict. c. 106, the sheriff was justified in discharging Brassington on production of the certificate. The authorities are conclusive as to the first point. Thus in *Wood* v. *De Mattos* (3), it was decided that "creditor," within s. 192, means a person having a debt proveable in bankruptcy, although not due at the date of the deed. *Ex parte Bank of England* (4), *Exley* v. *Inglis* (5), and *Topping* v. *Keysell* (6), shew that the debtor, creditors, and trustees of the deed are in all respects in the same position as if the debtor had

(1) There were demurrers to the 2nd plea and to the replication; see Law Rep. 3 Q. B. 178.

(2) Law Rep. 3 Q. B. 621.

(3) Law Rep. 1 Ex. 91.

(4) Law Rep. 2 Ch. App. 662.

(5) Law Rep. 3 Ex. 247.

(6) 16 C. B. (N.S.) 258; 33 L. J. (C.P.) 225.

been bankrupt and the trustees had been appointed assignees. But it is said that, as the debtor might have pleaded the deed, the certificate is no protection to him; no doubt that is so as between the debtor and creditor, but it is a very different question between the creditor and the sheriff.

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[LUSH, J. This point is not raised by the pleadings. The only issue is, whether the plaintiff's debt was barred by the deed.]

Seymour asked leave to amend the pleadings, but

PER CURIAM (Cockburn, C.J., Mellor, Lush, and Hannen, JJ.), the point was not suggested at the trial; the rule must be absolute to enter the verdict for the defendant.

Rule absolute.

Attorney for plaintiff: *T. E. Harper.*
Attorneys for defendant: *Palmer, Palmer, & Bull.*

[IN THE EXCHEQUER CHAMBER.]

May 10.

READHEAD *v.* THE MIDLAND RAILWAY COMPANY.

Carrier of Passengers—Railway Company—Measure of Obligation as to Road-worthiness of Carriages.

The contract made by a general carrier of passengers for hire with a passenger, is to take due care (including in that term the use of skill and foresight), to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose; that is to say, free from all defects likely to cause peril although those defects were such that no skill, care, or foresight could have detected their existence.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule for a new trial on the ground of misdirection. (1)

The Court of Queen's Bench (Blackburn, J., dissenting) held the defendants not liable for an accident caused by the breaking of the tyre of a wheel of a carriage in which the plaintiff rode, as there was no warranty by a carrier of passengers that the carriage should be absolutely roadworthy, and the defendants had used all diligence

(1) Law Rep. 2 Q. B. 412.

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in providing a safe carriage and examining it before starting, and in the course of the journey.

On the case coming on for argument in the Exchequer Chamber, it was agreed between the parties to take the judgment of the Court on a special case without pleadings, stated pursuant to the provisions of the Common Law Procedure Act, 1852.

The action was brought by the plaintiff to recover damages from the defendants, for injuries sustained by him whilst travelling as a passenger by railway from Nottingham to South Shields, in consequence of negligence alleged to have been committed by the defendants. The plaintiff took a second class ticket, and the carriage in which he was travelling got off the line and was upset, and the plaintiff received injuries therefrom. The cause of the carriage getting off the line and upsetting was the breaking of the tyre of one of the wheels, and such breaking arose from a latent defect in the tyre which was not attributed to any fault on the part of the manufacturer, and could not be detected previously to the breaking of the tyre.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover in the action.

The Court of Queen's Bench gave judgment for the defendants.

Nov. 26, 1868. *Manisty, Q.C.* (*Crompton* with him), for the plaintiff.

Kemplay (*Aspinall, Q.C.*, with him), for the defendants.

The arguments are fully noticed in the judgment. In addition to the cases noticed in the judgment the following authorities were cited: *Brown* v. *Edgington* (1); *Jones* v. *Bright* (2); *Shepherd* v. *Pybus* (3); *Jones* v. *Just* (4); *Lewis* v. *Peake* (5); *Burges v. Wickham* (6); *Buxton* v. *North Eastern Railway Company* (7); *Amies* v. *Stevens* (8); *Bluett* v. *Osborne* (9); *Birkett* v. *Whitehaven Junction Railway Company* (10); *McPadden* v. *New York Railway* (11);

(1) 2 M. & G. 279.
(2) 5 Bing. 533.
(3) 3 M. & G. 868.
(4) Law Rep. 3 Q. B. 197.
(5) 7 Taunt. 153.
(6) 3 B. & S. 669; 33 L. J. (Q.B.) 17.
(7) Law Rep. 3 Q. B. 549.
(8) 1 Str. 128.
(9) 1 Stark. 384.
(10) 4 H. & N. 730; 28 L. J. (Ex.) 348.
(11) 47 Barbour, 247.

Warner v. *Erie Railway Company* (1); *Bowen* v. *New York Central Railroad Company.* (2)

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Cur. adv. vult.

May 10. The judgment of the Court (Kelly, C.B., Byles, Keating, and M. Smith, JJ., Channell and Bramwell, BB.) was delivered by

MONTAGUE SMITH, J. In this case the plaintiff, a passenger for hire on the defendants' railway, suffered an injury in consequence of the carriage in which he travelled getting off the line and upsetting; the accident was caused by the breaking of the tyre of one of the wheels of the carriage owing to "a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking."

4 B.D. 38

Does an action lie against the company under these circumstances?

This question involves the consideration of the true nature of the contract made between a passenger and a general carrier of passengers for hire. It is obvious, that for the plaintiff on this state of facts to succeed in this action, he must establish either that there is a warranty, by way of insurance on the part of the carrier to convey the passenger safely to his journey's end, or, as the learned counsel mainly insisted, a warranty that the carriage in which he travels shall be in all respects perfect for its purpose, that is to say, free from all defects likely to cause peril, although those defects were such that no skill, care, or foresight could have detected their existence.

We are of opinion, after consideration of the authorities, that there is no such contract either of general or limited warranty and insurance entered into by the carrier of passengers, and that the contract of such a carrier and the obligation undertaken by him are to take due care (including in that term the use of skill and foresight) to carry a passenger safely. It of course follows that the absence of such care, in other words negligence, would alone be a breach of this contract, and as the facts of this case do not disclose such a breach, and on the contrary negative any want of skill, care or foresight, we think the plaintiff has failed to sustain his action

(1) 49 Barbour, 558. (2) 4 Smith, 408.

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and that the judgment of the Court below in favour of the defendant ought to be affirmed.

The law of England has, from the earliest times, established a broad distinction between the liabilities of common carriers of goods and of passengers. Indeed the responsibility of the carrier to redeliver the goods in a sound state can attach only in the case of goods. This responsibility (like the analogous one of innkeepers) has been so long fixed, and is so universally known, that carriers of goods undertake to carry on contracts well understood to comprehend this implied liability. If it had not been the custom of the realm or the common law declared long ago that carriers of goods should be so liable, it would not have been competent for the judges in the present day to have imported such a liability into their contracts on reasons of supposed convenience. But this is, as it seems to us, what we are asked by the plaintiffs to do in the case of carriers of passengers.

The liability of the common carrier of goods attached upon a particular bailment of the goods to him in his capacity of common carrier, and the rules which govern the rights of bailors or bailees of things, are of course applicable only to things capable of bailment. The law and the reasons for it in the case of bailments to carriers are found in the great judgment of Holt, C.J., in *Coggs* v. *Bernard* (1), and are thus stated, "As to the fifth sort of bailment, viz., a delivery to carry or otherwise manage for a reward to be paid to one that exercises a public employment or a delivery to a private person. First, if it be to a person of the first sort and he is to have a reward, he is bound to answer for the goods at all events, and this is the case of the common carrier, common hoyman, master of a ship, &c., which master of a ship was first adjudged, 26 Car. 2, in the case of *Mors* v. *Slue*. (2) The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the king. For though the force be never so great, as if an irresistible multitude of people should rob him, nevertheless he is chargeable. And this is a politic establishment contrived by the policy of the law for the safety of all persons, the necessity of whose affairs oblige them to trust these sorts of persons that they may be safe in their ways of dealing; for else these carriers might

(1) 1 Sm. L. C., 5th ed. 171. (2) Sir T. Raym. 220; 1 Vent. 190, 238.

have an opportunity of undoing all persons that had any dealings with them by combining with thieves, &c., and yet doing it in such a clandestine manner as would not be possible to be discovered. And this is the reason the law is founded upon in that point." The same law is found in numerous text books (some of which are referred to in the judgments of my Brothers Mellor and Lush in their judgments below) (1), and has been acted on for centuries in the case of carriers of goods.

The Court is now asked to declare the same law to be applicable to contracts to carry passengers. The learned counsel for the plaintiff felt the difficulty of the attempt to apply the entire liability of the carrier of goods to the carrier of passengers, but he contended for and mainly relied on the proposition that there was at least a warranty that the carriage in which the passenger travelled was roadworthy, and that the liability of the carriers of goods in this respect ought to be imported into the contract with the passenger.

But, first, it is extremely doubtful whether such warranty can be predicated to exist in the contract of a common carrier of goods. His obligation is to carry and redeliver the goods in safety whatever happens; in the words of Lord Holt, "he is bound to answer for the goods at all events." Again, "The law charges this person thus entrusted to carry goods against all events but acts of God and of the enemies of the king:" and this broad obligation renders it unnecessary to import into the contract a special warranty of the roadworthiness of the vehicle, for if the goods are safely carried and redelivered it would be immaterial whether the carriage was roadworthy or not, and if the goods are lost or damaged the carrier is liable on his broad obligation to be answerable "at all events;" and it is unnecessary to inquire how that loss or damage arose.

But, however that may be, it is difficult to see upon what principle the contract of the carrier of goods, which on the hypothesis does not apply in its entirety to carriers of passengers, is to be dissected and a particular part of it severed and attached to what, on the hypothesis, is another and different contract. It was contended that the reason which made it the policy of the law to impose the wider obligation on the carriers of goods applied with equal force

(1) Law Rep. 2 Q. B. at pp. 416, 421.

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to impose the limited warranty of the soundness of the carriage in favour of the passenger. The reason suggested was, as we understood it, that a passenger when placed in a carriage was as helpless as a bale of goods, and therefore entitled to have for his personal safety a warranty that the carriage was sound, but this is not the reason or anything like the reason given by Lord Holt for the liability of the carrier of goods. The argument founded on this reason, however, would obviously carry the liability of the carrier far beyond the limited warranty of the roadworthiness of the carriage in which the passenger happened to travel. His safety is no doubt dependent on the soundness of the carriage in which he travels, but in the case of a passenger on a railway it is no less dependent on the roadworthiness of the other carriages in the same train and of the engine drawing them, on the soundness of the rails, of the points, of the signals, of the masonry, in fact of all the different parts of the system employed and used in his transport, and he is equally helpless as regards them all.

If then there is force in the above reason, why stop short at the carriage in which the passenger happens to travel? It surely has equal force as to all these things, and, if so, it must follow as a consequence of the argument that there is a warranty that all these things should be and remain absolutely sound and free from defects. This, which appears to be the necessary consequence of the argument, although Mr. Manisty disclaimed the desire to press it so far, tries the value of it. But surely, if the law really be as it is now contended to be, it would have been so declared long ago. No actions have been more frequent of late years than those against railway companies in respect of injuries sustained by passengers. Some of these injuries have been caused by accidents arising from defects or unsoundness in the rolling stock, others from defects in the permanent works. Long inquiries have taken place as to the causes of these defects and whether they were due to want of care and skill, and these inquiries would have been altogether immaterial if warranties of the kind now contended for formed part of the contract.

An obligation to use all due and proper care is founded on reasons obvious to all, but to impose on the carrier the burden of a warranty that everything he necessarily uses is absolutely free

from defects likely to cause peril, when from the nature of things defects must exist which no skill can detect, and the effects of which no care or foresight can avert, would be to compel a man, by implication of law and not by his own will, to promise the performance of an impossible thing, and would be directly opposed to the maxims of law, Lex non cogit ad impossibilia—Nemo tenetur ad impossibilia.

If the principle of implying a warranty is to prevail in the present case, there seems to be no good reason why it should not be equally applied to a variety of other cases, as for instance to the managers of theatres and other places of public resort, who provide seats or other accommodation for the public. Why are they not to be equally held to insure by implied warranty the soundness of the structures to which they invite the public? But we apprehend it to be clear that such persons do no more than undertake to use due care that their buildings shall be in a fit state. Thus, a staircase in the Polytechnic Institution fell and injured several persons attending a public exhibition there. Two actions were brought by separate plaintiffs who had paid money for the use of this staircase. The first was tried before Wightman, J., the second before Erle, C.J. No one seems to have supposed there was any warranty of the soundness of the staircase; yet the persons using it were as helpless to detect or prevent the accident as the traveller. Both learned judges put the liability entirely on the question whether there was the want of due care in maintaining the staircase, and Erle, C.J., told the jury the defendants would not be liable for latent defects: *Brazier* v. *Polytechnic Institution* (1); *Pike* v. *Same*. (2) So, in stating the liability of a canal company, who made the canal for profit and allowed the public to use the canal on payment of tolls, Tindal, C.J., in delivering the judgment of the Court of Exchequer Chamber says, "The common law in such a case imposes a duty upon the proprietors, not perhaps to repair the canal, or absolutely to free it from obstructions, but to take reasonable care, so long as they keep it open for the public use of all who may choose to navigate it, that they may navigate without danger to their lives or property": *Lancaster Canal Company* v. *Parnaby*. (3) The liability in that case was not put in

(1) 1 F. & F. 507. (2) 1 F. & F. 712. (3) 11 A. & E. at p. 243.

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any degree upon a warranty that the canal should be free from perilous defects, but upon the rational obligation to use due care that it should be so.

The common law with regard to carriers of goods and innkepers stands, as I have said, on its own special grounds. But it has been found so stringent, not to say unjust, in the liabilities it imposed on persons carrying on those trades, that the legislature has found it necessary in both cases to modify its stringency.

It will now be necessary to examine the leading authorities cited during the argument.

2 Q.B.D. 116

The counsel for the plaintiff, in the first place, referred to some of the cases in which it has been held that in contracts for the supply of goods for a particular purpose, there is an implied warranty that the goods supplied shall be reasonably fit for that purpose: *Bigge* v. *Parkinson* (1), is a case of that class. But the agreement to sell and supply goods for a price which may be assumed to represent their value is a contract of a different nature from a contract to carry, and has essentially different incidents attaching to it. Indeed, the learned counsel did not cite these cases as directly governing the present. Even in the cases of contracts to supply goods it may be a question, on which it is not now necessary to express an opinion, how far and to what extent the vendor would be liable to the vendee in the case of a latent defect of the kind existing in the present case, which no skill or care could prevent or detect, that is to say, where an article is supplied which has been manufactured and tested in the best and most careful manner, so as to be turned out as perfect as in the nature of things it could be. It is clear that if the manufacturer is liable for such an inevitable and undiscoverable defect, he can never sell what he makes without the risk of an action attaching itself to every contract he enters into—without in fact becoming an insurer, unless he expressly limits his liability.

In cases of express warranties the compact of the parties is to be gathered from the words they use in making them. When warranties are expressly made, the parties themselves may guard against excessive liability by any exceptions they please, and in those implied by law the law itself must take care to keep them within the

(1) 7 H. & N. 955; 31 L. J. (Ex.) 301.

boundaries of reason and justice, so as not to impose impracticable obligations.

It is now proposed to consider the authorities relied on as having a direct bearing on the question before us. The case which the plaintiff's counsel relied on as the strongest in his favour is *Sharp* v. *Grey*. (1) But that case when examined furnishes no sufficient authority for the extensive liability which the plaintiff seeks to impose on the defendants. There the plaintiff was injured by an accident caused by the breaking of the axletree of a stage-coach. The defect might have been discovered if a certain examination had taken place, and it was made a question of fact at the trial whether it would have been prudent or not to make that examination. Tindal, C.J., at p. 458, who tried the cause, is reported to have directed the jury to consider "whether there had been on the part of the defendant that degree of vigilance which was required by his engagement to carry the plaintiff safely." Now, if the learned Chief Justice had supposed there was an absolute warranty of roadworthiness, this direction could not have been given, as it would have been an utterly immaterial consideration. The jury found, on this direction, for the plaintiff; and a motion was made in the absence of Tindal, C.J., for a new trial. Two of the learned judges (Gaselee and Bosanquet, JJ.) in refusing the rule, are certainly reported to have used expressions which seem to indicate that they thought the defendant bound to supply a roadworthy vehicle. Park, J., uses language which, as reported, is ambiguous. But the judgment of Alderson, J., is distinctly opposed to the notion of a warranty against latent and undiscoverable defects. He says, "A coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered by investigation." We have referred somewhat fully to this case, because it was put forward as the strongest authority in support of the plaintiff's claim which can be found in the English courts, and because it was relied on by the judges of the court of appeal in New York in a decision which will be afterwards referred to. But the case when examined furnishes no sufficient authority for the unlimited warranty now contended for. The facts do not raise the point for decision, and

(1) 9 Bing. 457.

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the authority of Tindal, C.J., and Alderson, J., is against the plaintiff.

The dictum of Best, C.J., in *Bremner* v. *Williams* (1) was not necessary to the decision of the case. The ruling of Lord Ellenborough in *Israel* v. *Clark* (2) was also relied on. Of these two last authorities Blackburn, J., in his judgment below (3) said, "These are, it is true, only nisi prius decisions, and neither reporter has such a character for intelligence and accuracy as to make it at all certain that the facts are correctly stated, or that the opinion of the judge was rightly understood." We find, also, that Best, C.J., makes observations in the opposite sense in the case of *Crofts* v. *Waterhouse.* (4) These are really the only English authorities which afford any support at all to the plaintiff's view, for the interpretation reported to have been given by Cresswell, J., in *Benett* v. *Peninsular and Oriental Steam Packet Company* (5) of the case of *Sharp* v. *Grey* (6) was only an observation made during an argument, when it was cited as incidentally bearing on the question then before the Court, and cannot be relied on as an authority.

On the other hand, there is not only the plain distinction between the liabilities of carriers of goods and of passengers, constantly referred to by text writers and judges as well known and settled law, but numerous cases have been decided on grounds entirely at variance with the supposition that there existed contemporaneously with them the liability by way of warranty. In *Aston* v. *Heaven* (7), which was the case of an injury to a passenger, Eyre, C.J., after carefully pointing out the law as to the liability of carriers of goods to make good all losses except those happening from the act of God or the king's enemies, and the reasons for it, says, "I am of opinion the cases of losses of goods by carriers and the present are totally unlike." Again, "There is no such rule in the case of the carriage of persons; this action stands on the ground of negligence alone." In *Christie* v. *Griggs* (8) Sir James Mansfield says, "There is a difference between a con-

(1) 1 C. & P. 414—416.
(2) 4 Esp. 259.
(3) Law Rep. 2 Q. B. at p. 437.
(4) 3 Bing. 319.
(5) 6 C. B. at p. 782.
(6) 9 Bing. 457.
(7) 2 Esp. 533.
(8) 2 Camp. 79.

tract to carry goods and a contract to carry passengers. For the goods the carrier was liable at all events, but he did not warrant the safety of the passengers. His undertaking as to them went no further than this, that as far as human care and foresight could go he would provide for their safe conveyance." In *Crofts* v. *Waterhouse* (1) the observations attributable to Best, C.J., clearly shew that he did not think there was any warranty on the part of the carrier of passengers, and Park, J., in the same case, says, "A carrier of goods is liable at all events . . . a carrier of passengers is only liable for negligence."

But besides the observations of individual judges to shew what has hitherto been understood to be the law, there is the series of important cases involving costly and protracted trials, in which, by common consent, the liability of carriers of passengers has been based upon the duty to take due care, and not upon a warranty.

In *Groŧe* v. *Chester and Holyhead Railway Company* (2), where the accident arose from the breaking down of one of the bridges of the railway, the case turned on what would or would not be negligence for which the company were answerable. Parke, B., said (3): "It seems to me the company would still be liable for the accident unless he (the engineer) also used due and reasonable care and employed proper materials in the work." There is no trace in the report that it ever occurred to the Court to suppose there was any warranty of the safety of the bridge.

In a case tried before Erle, C.J., *Ford* v. *London and South Western Railway Company* (4), the plaintiff was injured by the tender of the train being thrown off the line, and one of the causes was alleged to be the defective tyre of one of the wheels of the tender. Erle, C.J., in his direction told the jury, "The action is grounded on negligence. Negligence is not to be defined, because it involves some inquiry as to the degree of care required, and that is the degree which the jury think is reasonably to be required from the parties, considering all the circumstances. The railway company is bound to take reasonable care to use the best precautions in known practical use for securing the safety of their passengers." There the defect was in the tyre of a wheel of the tender of the

(1) 3 Bing. 319.
(2) 2 Ex. 251.
(3) 2 Ex. at p. 254.
(4) 2 F. & F. 730, 732.

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train by which the plaintiff travelled. And no suggestion that a warranty of its soundness existed was made throughout the case.

But a case still more directly bearing upon the present point was tried before Cockburn, C.J. (1) There the accident happened in consequence of the breaking of the tyre of the near wheel of the engine. The tyre broke from a latent flaw in the welding. The trial lasted six days, and the questions mainly were whether the flaw was not visible, and whether by the exercise of care it might not have been detected. The Lord Chief Justice commences a full direction to the jury by saying: (2) "The question is, whether the breaking of the tyre resulted from any negligence in the defendants, or their servants, for which they are responsible." The latent defect in the tyre was admitted to be the cause of the accident; but the jury having found, in answer to specific questions, that there was no evidence that the tyre was negligently welded, and that the defect had not become visible, and having in other respects negatived negligence, the verdict was entered for the defendants. The facts of that case appear to be exactly like the present, except that in this case the defective tyre was in the wheel of the carriage, and there in the wheel of the engine. But for the reasons already given, it can never be that a warranty can exist as to the carriage, but not as to the engine drawing it. Thus, then, it is plain a trial of six days took place on issues which were utterly immaterial if a warranty ought to have been implied, and there the learned Chief Justice, and the parties themselves, seem to have been utterly unconscious of the contract which was really existing, if the plaintiff in this case is right; for the warranty, as an obligation implied by law, must have existed at the time of these trials, if it exists now; and surely it is strong to shew that no such rule does form part of the common law that it was not then recognized and declared.

The learned counsel for the plaintiff insisted that a carrier by sea is bound to have his ship seaworthy. Undoubtedly, the carrier of goods by sea, like the carrier of goods by land, is bound to carry safely, and is responsible for all losses, however caused, whether by the unseaworthiness of the ship or otherwise, and it does not appear

(1) *Stokes* v. *Eastern Counties Railway Company*, 2 F. & F. 691.
(2) 2 F. & F. at p. 693.

to be material to inquire when he is subject to this large obligation, whether he is also subject to a less one. In the case of *Lyon* v. *Mells* (1), it was no doubt stated by the Court that the carrier of goods is bound to have a seaworthy ship, but this only as part of his general liability. It is well to observe that Holroyd, who argued for the plaintiff, and Gaselee for the defendant, both state the liability of the carrier in all its breadth, viz., a liability for all losses however happening, except by the act of God or the King's enemies. This case therefore falls within the class of decisions relating to the liability of the carriers of goods. No case has been found where an absolute warranty of the seaworthiness of the ship in the case of passengers has arisen, and it affords a strong ground for presuming that no such liability exists, that in this maritime nation no passenger has ever founded an action on it.

The case of *Burns* v. *Cork and Bandon Railway Company* (2), in the Irish Court of Common Pleas, certainly does not support the plaintiff's view of the law. The Court say there, the averments in the defendant's plea are all consistent with gross and culpable negligence, and on that ground give judgment for the plaintiff. The judgment plainly shews that the Court do not mean to declare that there is an absolute undertaking that the vehicle shall be free from defects. The language is, "free from defects as far as human care and foresight can provide, and perfectly roadworthy." The Court refer with approbation to the language of Sir James Mansfield, and Alderson, J., which helps to explain that they were disposed to adopt the views of those learned judges, and to place the liability, not on a warranty, but on the obligation to exercise care and foresight.

It now remains to consider the American decisions on the subject. They have not been uniform. The judgment of Mr. Justice Hubbard in *Ingalls* v. *Bills* (3), cited at length by my Brother Mellor in his judgment below (4), is opposed to the notion of a warranty.

Decisions however were cited before us by Mr. Manisty from the courts of the State of New York, having a contrary tendency, to shew us that in that State the law had been declared in favour of

(1) 5 East, 428.
(2) 13 Ir. Com. Law Rep. 543.
(3) 9 Metcalf, 1—15.
(4) Law Rep. 2 Q. B. at p. 430.

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annexing a warranty to the contract. The most important of these cases is *Alden* v. *New York Central Railway Company* (1), in the court of appeal of the State of New York. That was the case of an accident caused by a defect in an axletree, and the reasons given by Gould, J., for the decision are not satisfactory to our minds. The learned judge seems to assume that there was no negligence shewn on the part of the company. He cites the case of *Sharp* v. *Grey* (2), in the Court of Common Pleas here, and he interprets that case to determine that the carrier warrants the roadworthiness of his coach. But if the view of the case of *Sharp* v. *Grey* (2), taken in the early part of this judgment is correct, the learned judge gave too great weight to it. Gould, J., then, after having given the rule as he supposed it to be laid down in *Sharp* v. *Grey* (2), observes (3), "And though this may seem a hard rule it is probably the best that can be laid down, since it is plain and easy of application, and when once established is distinct notice to all parties of their duties and liabilities." With deference to the learned judge, those reasons founded on the convenience of the arrangement are scarcely sufficient to warrant the introduction of onerous obligations into the contracts of parties, and the terms in which the judgment is given rather lead to the conclusion that the learned judge was conscious that he was annexing to the contract of the carrier of passengers what had not hitherto been understood to form part of it. The English courts are desirous to treat the American decisions with great respect, but as their authority here must mainly depend on the reasons on which they are founded, we have felt bound to examine the reasons on which this decision was based, with the result which has been already stated.

5 QB 193
9 QB 127-8
2 Ex D. 340

Warranties implied by law are for the most part founded on the presumed intention of the parties, and ought certainly to be founded on reason, and with a just regard to the interests of the party who is supposed to give the warranty, as well as of the party to whom it is supposed to be given.

We have already gone fully into the reasons for holding that in our opinion the warranty contended for in this case is not so founded.

On the other hand, it seems to be perfectly reasonable and just

(1) 12 Smith, 102. (2) 9 Bing. 457. (3) 12 Smith, at p. 104.

to hold that the obligation well known to the law, and which because of its reasonableness and accordance with what men perceive to be fair and right, have been found applicable to an infinite variety of cases in the business of life, viz., the obligation to take due care, should be attached to this contract. We do not attempt to define, nor is it necessary to do so, all the liabilities which the obligation to take due care imposes on the carriers of passengers. Nor is it necessary, inasmuch as the case negatives any fault on the part of the manufacturer, to determine to what extent and under what circumstances they may be liable for the want of care on the part of those they employ to construct works, or to make or furnish the carriages and other things they use. See on this point *Grote* v. *Chester and Holyhead Railway Company.* (1) "Due care" however undoubtedly means, having reference to the nature of the contract to carry, a high degree of care, and casts on carriers the duty of exercising all vigilance to see that whatever is required for the safe conveyance of their passengers is in fit and proper order. But the duty to take due care, however widely construed or however rigorously enforced, will not, as the present action seeks to do, subject the defendants to the plain injustice of being compelled by the law to make reparation for a disaster arising from a latent defect in the machinery which they are obliged to use, which no human skill or care could either have prevented or detected.

In the result we come to the conclusion that the case of the plaintiff, so far as it relies on authority, fails in precedent; and so far as it rests on principle, fails in reason. Consequently the judgment of the Court of Queen's Bench in favour of the defendants will be affirmed.

Judgment affirmed.

Attorneys for plaintiff: *Young, Maples, & Co.*
Attorneys for defendants: *Beale, Marigold, & Beale.*

(1) 2 Ex. 251.

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May 11.

LEVERSON *v.* THE QUEEN.

Central Criminal Court—Jurisdiction and Constitution of—4 & 5 *Wm.* 4, *c.* 36, *ss.* 1 & 2—*Judge of Sheriff's Court*—30 & 31 *Vict. c.* 142, *s.* 35.

A verdict and judgment having been given against the defendant on an indictment in the Central Criminal Court, error was brought on the following grounds:—1. That two commissioners being necessary under 4 & 5 Wm. 4, c. 36, to constitute the Central Criminal Court a court for the trial of an indictment, an alderman sat for this purpose with the judge of the Sheriff's Court who tried the indictment, and the trial having lasted several days, a different alderman was substituted in the course of the trial; whereas the Court should have consisted of the same two commissioners throughout the trial. 2. That the trial took place in a second Court, while the general sessions were being held before other justices in their ordinary place of sitting; whereas by 4 & 5 Wm. 4, c. 36, a single Court only is established and authorized to be held. 3. That in consequence of the changes which had been made by different statutes in the jurisdiction of the Sheriff's Court, the judge of that court who presided at the trial as judge had ceased to be a commissioner under 4 & 5 Wm. 4, c. 36, and was therefore incompetent to act as a judge under the commission of oyer and terminer in the trial of this indictment:—

Held, that none of the grounds of error were tenable.

Writ of error from the general session of oyer and terminer and general session of the delivery of the Queen's gaol of Newgate holden for the jurisdiction of the Central Criminal Court at Justice Hall in the Old Bailey, in the suburbs of the city of London, on Monday, the 17th of August, &c., before, &c., and others their fellows justices of our said Lady the Queen, assigned by letters patent of our Lady the Queen made under the great seal, &c., to the same justices above named and others, or any two or more of them directed to inquire more fully the truth by the oath of good and lawful men of the city of London and county of Middlesex, and those parts of the county of Essex, Kent, and Surrey, which are mentioned and enumerated in 4 & 5 Wm. 4, c. 36, &c.

The record then alleged that the indictment, which contained seventeen counts, charging that Sarah Rachel Leverson had by false pretences fraudulently obtained from Mary Tucker Borrodaile certain goods and chattels, to which she pleaded not guilty, and the jury not being able to agree upon their verdict were discharged, and the defendant was committed to the custody of the sheriffs to be further dealt with according to law.

And thereupon afterwards, to wit, at a like general sessions of oyer and terminer and general session of the delivery of the Queen's gaol of Newgate, holden for the jurisdiction aforesaid at Justice Hall aforesaid, on Monday, the 21st of September, &c., before the said W. F. Allen, Esq., mayor of the said city, Sir H. S. Keating, Knight, one of the justices of our said Lady the Queen of her Court of Common Pleas, Sir F. Moon, Bart., Sir W. R. Carden, Knight, W. S. Hale, Esq., alderman of the said city, the Right Honourable Russell Gurney, recorder of the said city, J. Causton, Esq., T. S. Owden, Esq., other the aldermen of the city, Robert Malcolm Kerr, Esq., Judge of the Sheriff's Court of the said city, and others their fellows justices of our said Lady the Queen assigned in form aforesaid come, &c. The record then set out the venire, and proceeded:—

"And for the public convenience and the more speedy despatch of the public business of the said session the said last named justices do not sit altogether in one room in Justice Hall aforesaid, but constitute themselves into and hold three distinct Courts in three several rooms in the hall at the session, and the jurors of the last mentioned jury for this purpose in due form of law impanelled and returned, to wit Wm. Merrifield, &c., good and lawful men of the jurisdiction aforesaid qualified according to law being called, come and are in one of the three distinct Courts before Robert Malcolm Kerr, Esq., and Joseph Causton, Esq., chosen, tried, and sworn to speak the truth of and concerning the premises, divers others of the justices above named being then present in the others of the said Courts holding the sessions, and thereupon the trial of Sarah Rachel Leverson is proceeded with before Robert Malcolm Kerr, Esq., and Joseph Causton, Esq., divers others of the justices above named being then present in the others of the Courts holding the session, and it manifestly appearing to the Court impossible to conclude the trial of the indictment on Monday, the 21st of September, therefore the last mentioned session and the trial are by the Court duly adjourned until Tuesday, the 22nd of September, and day is given as well to Henry Avory, who prosecutes for our Lady the Queen, as to Sarah Rachel Leverson until the Tuesday, at which last mentioned general session of oyer and terminer and general session of the delivery of the gaol of Newgate, holden by

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the adjournment for the jurisdiction at the Justice Hall on the Tuesday, the 22nd of September in the year aforesaid, before Robert Malcolm Kerr, Esq., and others his fellows justices last above named, come Henry Avory and Sarah Rachel Leverson, and the trial of Sarah Rachel Leverson is further proceeded with in one of the Courts in the hall before Robert Malcolm Kerr, Esq., and W. S. Hale, Esq., divers others of the justices above named being then present in other Courts in the hall holding the session.

The record then set out a like adjournment to Wednesday, the 23rd of September, when the trial is further proceeded with in one of the Courts in the hall before Robert Malcolm Kerr, Esq., and Sir Robert Walter Carden, Knight, and Joseph Causton, Esq., divers others of the justices above named being then present in other Courts in the hall holding the session.

The record then set out a further adjournment to Thursday, the 24th of September, and the trial is further proceeded with in one of the Courts in the hall before Robert Malcolm Kerr, Esq., Sir Robert Walter Carden, Knight, and Joseph Causton, Esq., divers other of the justices above named being then present in other Courts in the hall holding the session.

The record then set out a further adjournment to Friday, the 25th of September, and the trial of Sarah Rachel Leverson is further proceeded with in one of the Courts in the hall before Robert Malcolm Kerr, Esq., Joseph Causton, Esq., and T. S. Owden, Esq., divers others of the justices above named being then present in other Courts in the hall holding the session, and the said Robert Malcolm Kerr, Esq., as judicial president of the Court in which the trial is had doth sum up to the last mentioned jurors the facts given in evidence on the trial, and doth direct them upon the law relating thereto."

The record then alleged that the defendant was found guilty, and R. M. Kerr, Esquire, as judicial president, sentenced her to be kept in penal servitude for five years.

The assignment of error was as follows:—

That the misdemeanours alleged and charged in the indictment against Sarah Rachel Leverson were not inquired of, heard, determined, and adjudged by two or more justices within the meaning of the statute in such case made.

That the same justices and judge of the Central Criminal Court did not, nor did the same two or more of them inquire of, hear, determine, and adjudge the misdemanours alleged and charged in the said indictment against Sarah Rachel Leverson.

That Robert Malcolm Kerr, Esquire, before whom the alleged misdemeanours alleged and charged in the indictment against Sarah Rachel Leverson, were inquired of, heard, determined, and adjudged, was not at the time when the misdemeanour were inquired of, heard, determined, and adjudged, one of the judges of the Sheriff's Court of the city of London, within the meaning of the statute in that behalf made, nor was he named or appointed by any general commission to be one of the judges of the Central Criminal Court within the meaning of the statute.

That the several commissions of oyer and terminer and of gaol delivery by virtue of which Robert Malcolm Kerr, Esquire, among others, was authorized to inquire of, hear, determine, and adjudge the misdemeanours alleged and charged in the indictment against Sarah Rachel Leverson, had, as regards Robert Malcolm Kerr, Esquire, determined and become of no effect in law before and at the time of the general session in the record mentioned.

That the misdemeanours alleged and charged in the indictment against Sarah Rachel Leverson were inquired of, heard, determined, and adjudged by certain of the justices in a room separate and apart from the others of the justices then in general sessions assembled, and sitting as usual in their ordinary place of sitting, the room not having been a place appointed by either of the commissions or by the justices or judges by virtue and in pursuance thereof, or by any two or more of them against the form of the statute in such case made.

That the indictment and proceedings aforesaid, and the matters therein contained, are not sufficient in law to warrant the judgment so given against Sarah Rachel Leverson, or to convict her of the misdemeanours aforesaid or either of them.

That the judgment aforesaid in the form aforesaid is given for our Lady the Queen; whereas, the judgment by the law of the realm ought to have been given against our Lady the Queen and for Sarah Rachel Leverson, concluding with the usual prayer of judgment.

Joinder in error.

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May 1. *Mellish, Q.C.* (*Gibbons* with him), for the plaintiff in error. The chief ground of error is, that the same two commissioners were not present during the whole of the trial. The 4 & 5 Wm. 4, c. 36, s. 1 (1), constitutes the Central Criminal Court, and s. 2 enacts that it shall be lawful for the justices and judges of the

(1) 4 & 5 Wm. 4, c. 36, s. 1, enacts that, "Whereas it is expedient, for the more effective and uniform administration of justice in criminal cases, that offences committed in the metropolis and certain parts adjoining thereto should be tried by justices and judges of oyer and terminer and gaol delivery in the city of London: Be it therefore enacted, that the lord mayor for the time being of the city of London, the Lord Chancellor or Lord Keeper of the Great Seal, and all the judges for the time being of his Majesty's Courts of King's Bench, Common Pleas, and Exchequer, the chief judge and the two other judges in Bankruptcy, the judge of the Admiralty, the dean of the Arches, the aldermen of the city of London, the recorder, the common serjeant, the judges of the Sheriff's Court of the city of London for the time being, and any person or persons who hath or shall have been Lord Chancellor, Lord Keeper, or a judge of any of his Majesty's superior courts of Westminster, together with such others as his Majesty, his heirs and successors, shall from time to time name and appoint by any general commission as hereafter stated, shall be and be taken to be the judges of a court to be called the 'Central Criminal Court,' to which his Majesty, and his heirs and successors, may direct his general commission as hereinafter mentioned; and which Court shall have jurisdiction to hear, try, and determine all offences committed or alleged to be committed as hereinafter specified."

S. 2: "That it shall be lawful for his Majesty, his heirs and successors, from time to time to command and cause to be issued commissions of oyer and terminer, to inquire of, hear, and determine all treasons, &c., committed within the city of London and county of Middlesex," and certain limits of the counties of Essex, Kent, and Surrey; "and also commissions of gaol delivery to deliver his Majesty's gaol of Newgate of the prisoners therein charged with any of the offences aforesaid committed within the limits aforesaid; and it shall be lawful for the justices and judges of the Central Criminal Court aforesaid, or any two or more of them to inquire of, hear, determine, and adjudge all such treasons, &c., and all treasons, &c., which might be inquired of, heard, and determined under any commission of oyer and terminer for the city of London or county of Middlesex, or commission of gaol delivery to deliver the gaol of Newgate, or which, in case the parts of the counties of Essex, Kent, and Surrey respectively comprised within the limits aforesaid had been counties of themselves, might have been inquired of, heard, and determined under commissions of oyer and terminer and gaol delivery for such counties, and to deliver the said gaol of Newgate at such times and places in the said city or the suburbs thereof as by the said commissions shall be appointed, or as the said justices or judges, by virtue and in pursuance thereof, or any two or more of them shall appoint, and to award and issue all precepts, and proofs, and use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery."

Central Criminal Court, "or any two or more of them," to try all offences. That plainly means that the same two justices are to hear the case throughout. By s. 1, an alderman is a judge, and there is nothing to prevent two aldermen, provided they are present during the whole time, from sitting and trying an offence, for there is no quorum clause rendering it necessary that a legal judge shall be one of the justices. The whole trial is one judicial act, and must be carried out by the same persons, the object being that the accused shall have the benefit of two minds: *Billings* v. *Prinn.* (1) Wherever a statute requires a judicial act to be done by two persons, they must act together: *Rex* v. *Forrest* (2); *Rex* v. *Hamstall Ridware.* (3) The reason is, that the result of their conferring together is the ground of their determination. The same justices not having sat throughout the trial, there has been a mistrial.

The second ground of error is that more than one Court was sitting during the trial. The statute creates but one Court, and there is no authority to divide it. The general principle is that where a Court is a single Court, it cannot divide itself except by virtue of some statute. Thus 59 Geo. 3, c. 28, and 5 & 6 Vict. c. 38, s. 4, empower justices to divide the Court of Quarter Sessions; 57 Geo. 3, c. 11, enables a judge of the Court of Queen's Bench to sit apart in the Bail Court for the purpose of justifying bail; 7 Wm. & 1 Vict. c. 19, s. 1, enables a recorder to divide the Court of Quarter Sessions; and the Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), s. 2, enables two judges of the superior Courts respectively to sit contemporaneously at Nisi Prius in separate courts in Westminster or London. The fact of these statutes being passed shews that a statutory power is necessary.

The third ground of error is that Mr. Commissioner Kerr has ceased to be the judge of the Sheriff's Court. That court is in effect abolished by 30 & 31 Vict. c. 142, s. 35, and the proviso in that section only preserves the powers, rights, and privileges of the judge of the Sheriff's Court to enable him to discharge the duties of the judge of the City of London Small Debts Court.

(1) 2 W. Bl. 1017. (2) 3 T. R. 38. (3) 3 T. R. 380.

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Sir J. D. Coleridge, S. G. (*Archibald* and *Poland* with him), for the Crown. As to the first ground of error, s. 1 of 4 & 5 Wm. 4, c. 36, makes the persons mentioned therein a Court, and the power of the Court resides in, and may be exercised by, each member; s. 2 enacts that commissions of oyer and terminer and gaol delivery are to be issued. The Court is therefore placed in the same position as the commissioners of oyer and terminer and general gaol delivery. As the legislature made the judges of the Central Criminal Court commissioners of oyer and terminer, it must be taken that in using words of well known import in the law it was intended that these judges should proceed according to the long established practice of such commissioners, and it was notorious that on circuit two commissioners of oyer and terminer and gaol delivery did not ordinarily sit together. The words of the commission contemplated that more than one of the persons named therein should be present together at every trial held thereunder, and a proviso was added that one of the judges of the superior courts should be one of these persons. The words set out in 4 Ins. 162 are, "Sciatis quod assignavimus vos et tres vestrum quorum aliquem vestrum vos præfat. R. Manwood et J. Jeffery unum esse volumus;" and the same words are now used: 4 Chitty's Crim. Law, p. 134. Yet it is everyday practice that one commissioner alone sits; the reason is that every commissioner is constructively present at each trial. The precedent for an indictment for perjury alleges that both judges in the commission were present at the trial at which the perjury was committed, though it is well known only one sits: Arch. Crim. Pl. and Ev. p. 714, 15th ed. On the second ground of error, the inveterate practice under a commission of oyer and terminer and general gaol delivery is for the commissioners to sit in separate courts. The commission appears to authorize only one court, but the practice is to hold as many as may be convenient for the despatch of public business. The 59 Geo. 3, c. 28, was only a declaratory Act; for previous to its passing a court of quarter sessions might have been divided, but the necessity for passing the Act arose from the fact that the clerk of the peace had no power to appoint a deputy to act in the second court: that is provided for by s. 3. As to the third ground of error. By no statute has the Sheriff's Court been abolished, and the powers

of the judge of that court are all preserved by the proviso in s. 35 of 30 & 31 Vict. c. 142.

Mellish, Q.C., in reply.

Cur. adv. vult.

May 11. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hayes, JJ.) was delivered by

COCKBURN, C.J. A writ of error having been brought by the defendant to set aside the conviction and judgment in this case, error was assigned on different grounds set out on the record, but which may in substance be reduced to three heads.

1. That two commissioners being necessary under the Act 4 & 5 Wm. 4, c. 36, the Act by which the Central Criminal Court was established, to constitute a court for the trial of indictments, and an alderman having sat for this purpose with Commissioner Kerr, and the trial having lasted several days, a different alderman was substituted in the course of the trial for the alderman previously attending, whereas the Court should have consisted of the same two judges throughout the trial.

2. That the trial took place in a second court, while the general sessions were being held before other justices in their ordinary place of sitting, whereas by the 4 & 5 Wm. 4, c. 36, a single court only is established and authorized to be held.

3. That, in consequence of the changes which have been made by different acts of parliament, the jurisdiction of the Sheriff's Court, as a judge of which latter court Mr. Commissioner Kerr acted as a judge at the Central Criminal Court, had been abolished: so that Mr. Commissioner Kerr, who presided at the trial, had ceased to be a commissioner under the Act 4 & 5 Wm. 4, c. 36, and was therefore incompetent to act as a judge under the commission of oyer and terminer on the trial of this indictment.

The first of these grounds of error is the only one of the three which really presents any difficulty, and it was upon this alone that we thought it necessary to take time to consider our judgment. Upon further consideration, however, we are of opinion that this ground of error is untenable.

It is true that the 4 & 5 Wm. 4, c. 36, after establishing and constituting the Central Criminal Court, and authorizing the Crown

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to cause commissions to be issued to try offences before it, goes on to enact that it shall be lawful for the judges of the said Central Criminal Court, "or any two or more of them, to inquire of, hear, determine, and adjudge" the offences specified; and there can be no doubt that if this enactment is to be construed to mean that two judges are required to sit on the trial of an indictment, a very serious question would arise whether the provisions of the statute had been complied with on the trial of the defendant.

But we are of opinion that such is not the effect of the Act in question.

It is to be observed that the commissions to be issued under the Act are commissions of oyer and terminer, and that the language of the Act, and of course that of the commissions issued under it, is the same as that of the commissions of oyer and terminer under which justice in criminal cases has been administered for several centuries. The Act must therefore, we think, be read by the light of the procedure of the other superior courts of criminal judicature of the realm held under such commission. We feel warranted in assuming that the legislature, in establishing the Central Criminal Court, to exercise jurisdiction in criminal matters, not only over the area of the city of London, but also over a large district taken from the adjoining counties, intended that the administration of justice should be conducted in the Court thus established according to the universal practice of all other Courts of oyer and terminer.

This is the more apparent from the language of the Act of 4 & 5 Wm. 4, which expressly provides "that it shall be lawful for the justice and judges of the Central Criminal Court aforesaid, or any two or more of them, to inquire of, hear, determine, and adjudge all such treasons, murders, felonies, and misdemeanours which might be inquired of, heard, and determined under any commission of oyer and terminer for the city of London or county of Middlesex, or which, in case the parts of the counties of Essex, Kent, and Surrey respectively comprised within the limits aforesaid had been counties of themselves, might have been inquired of, heard, and determined under commissions of oyer and terminer and gaol delivery for such counties, and shall use and exercise all powers and authorities belonging to justices of oyer and terminer and gaol delivery."

Now, from the earliest period, commissions of oyer and terminer have been framed in the same terms as are employed in the statute in question. In these commissions a certain specified number of the persons, some of whom are named, are always constituted a quorum. Yet, for centuries the trials of offences under such commissions upon the circuits of the judges, have been held before a single judge, and the proceedings are nevertheless represented on the record as taking place not before one judge but before the other judges sitting under the commission. Now, this, we apprehend, must have proceeded on the ground that, while the whole body of the justices named in the commission constituted the Court of oyer and terminer, each judge sitting under it represented the Court; so that whatever took place before the single judge was considered as done, constructively, before the whole Court. Hence, at the assizes, every trial on the criminal side of the Court, even when the trial takes place not before a judge but before a serjeant or Queen's counsel, is represented on the record (as is also the case on trials at nisi prius) as taking place before both the judges of the superior courts "and other justices their fellows."

It is true that a belief has prevailed that on the trial of indictments before a single judge, the presence of one of the officers of the assize (who are always included in the commission of oyer and terminer on the circuits) was necessary, properly to constitute the Court. But we think that this is the case only where no other member of the commission is acting under it, so as to be constructively present. This view is borne out by the fact, to which we have already adverted, that by the caption of an indictment, the proceedings are stated to have taken place before both of the judges of Westminster Hall holding the assize, though one only is present; the same thing occurring where a trial takes place before a serjeant-at-law or a Queen's counsel; while, on the other hand, on the Welch circuits, and winter circuits, where there is no second judge, the practice is to represent the proceedings as taking place before the judge and the officer, who, being included in the commission, of course forms part of the Court.

All this seems to us to shew that, under a commission of oyer and terminer, not only may the general Court be divided into as many courts as convenience may require, but that each separate

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Court is to be considered as held not only before the judge actually sitting, but also, constructively, before all the members of the commission then acting under it.

The language of the Act of 4 & 5 Wm. 4, and of the commissions under it, being the same as in the general commissions of oyer and terminer, and the practice having, as we have said, prevailed for centuries that, where the trial takes place before a single judge, such trial is considered and recorded as taking place before the required quorum, we cannot suppose that it was the intention of the legislature that different principles of construction, or a different course of practice should be introduced into the Central Criminal Court. We cannot suppose that while a trial for a capital offence can take place elsewhere before a single judge, the presence of an alderman should be necessary in addition to that of a professional judge on such a trial at the Central Criminal Court.

Applying, therefore, the inveterate practice of the criminal courts of this country to the proceedings of the Central Criminal Court it appears to us that, while there were other judges under the same commission, sitting at the then sessions, the presence of a second member of the commission in the Court presided over by Mr. Commissioner Kerr on the trial of this indictment was unnecessary. It would have been in our judgment sufficient and perfectly proper, in accordance with the general practice of criminal courts, to state on the record that the proceedings were heard before Mr. Commissioner Kerr and any other judge actually sitting under the commission in one of the other courts; or, indeed, before any two judges actually sitting in the principal Court. It is true that in this record the proceedings are not represented simply as having been had before the commissioner and some other judge then sitting. At the instance of the defendant, in order to raise this objection, the trial is stated to have been held before Commissioner Kerr and different aldermen successively. But as we are of opinion that the presence of a second commissioner in the Court presided over by Mr. Kerr was unnecessary, and as it appears from the record that other members of the commission were sitting in another Court at the same time, we think that it sufficiently appears from the whole record that the trial took place under

such circumstances as to make the conviction and judgment good.

As a further argument against this ground of error, it was urged by the counsel for the Crown that even supposing that the attendance of one of the aldermen was necessary, in addition to the presiding judge, yet as his attendance could only be required to constitute and to maintain the continuity of the Court, and as according to the invariable practice, a lay member of a commission so present takes no part judicially in the proceeding, which is left entirely to the professional or presiding judge, the presence of such second judge is only required to satisfy a technical necessity and is consequently a mere matter of form, and hence, so long as a second member of the commission is present to make up the quorum, it must be perfectly immaterial if the person of such additional judge is changed in the course of the trial.

My learned Brothers are of opinion that this argument is well founded, and sufficient to entitle the Crown to judgment on the first ground of error assigned.

Speaking for myself, I feel bound to say that I am not prepared to adopt this view. If a second member of the commission be necessary, on a trial, to constitute the Court, I entertain grave doubts whether, inasmuch as such member is appointed a judge by the commission and attends in the character of a judge, he must not be taken to be an integral member of the Court, and, as the commission makes no distinction between professional judges and lay judges, might not, if he thought proper, take part, and, under very special circumstances might be bound, as a matter of duty, to take part in the proceedings, just as when two of the superior judges sit on a trial at the Central Criminal Court, the second judge frequently does. This being so, I cannot but think that if a second judge were necessary, the judge must be the same throughout the trial—just as where a trial takes place before a single judge, the judge must be the same throughout, and the cause cannot be heard in part before one judge and in part before another—not only because such a proceeding would be contrary to the established course of all judicial procedure, and an outrage on all judicial propriety, but also because in such a case the cause would not have

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been "inquired of" and "heard" by the judge or judges by whom it is "determined and adjudged."

Feeling pressed by these considerations, I prefer to rest my judgment on the former ground, on which we are all agreed that the first head of error must be decided adversely to the defendant.

The second ground of error assigned is that the indictment was tried in a second Court, while one Court only could be held consistently with the act of parliament constituting the Court.

In disposing of the first point we have incidentally disposed of this. When it is settled that the Act is to be read by the light of what is the established practice under commissions of oyer and terminer in general, the objection necessarily fails. According to the practice of centuries, the judges acting under the latter commissions, as well as those acting under the commissions of nisi prius, have been in the habit of dividing their courts, and of sitting, when business required it, in two or more courts for the dispatch of business at the same time. The same practice prevailed at the Old Bailey before the present Court was established. It has existed at the Central Criminal Court since the court was established thirty-six years ago; and it has never occurred to any of the very many learned judges who have sat there, or of the able counsel who have practised there, to question the perfect propriety of this course of proceeding. We think there is nothing whatever in the objection thus taken.

The third ground of error is that Mr. Commissioner Kerr had ceased to be qualified to act as a judge under the 4 & 5 Wm. 4, c. 36. This objection may be disposed of in a word. It is true that the Sheriff's Court, as a judge of which Mr. Kerr is a judge of the Central Criminal Court, has been by recent acts of parliament converted into a county court within the district in which it previously exercised jurisdiction, for the purposes for which county courts have been elsewhere established; but the Sheriff's Court has never been abolished; and by the saving clause of the 30 & 31 Vict. c. 142, s. 35, the powers of the judge of that court have been expressly preserved; and, the Judges of the Sheriff's Court having been appointed judges of the Central Criminal Court by the Act

constituting that Court, it follows that in respect of the latter jurisdiction their authority remains unaltered. This ground of error appears to us wholly untenable.

The grounds of error assigned thus failing, it follows that our judgment must be for the Crown.

Judgment for the Crown.

Attorney for plaintiff in error: *Heritage.*
Attorneys for the Crown: *Lewis & Lewis.*

THE QUEEN *v.* SIR TRAVERS TWISS.

May 3.

Prohibition to Ecclesiastical Court—Faculty to apply Consecrated Ground to Secular Purposes—Prohibition by a Stranger to the Suit.

The guardians of the poor of a parish, being owners in fee of land, on part of which a parish workhouse had been erected, and another part of which had been consecrated as a burial ground, prayed a faculty in the Consistory Court of London to authorize the erection of a chapel for the inmates of the workhouse, and other buildings connected with the workhouse, on a part of the consecrated ground in which no bodies had been buried. No sentence had been pronounced by the Consistory Court; and B., a stranger to the parish and having no interest in the matter, obtained a rule for a prohibition to prohibit proceedings in the suit. The Court discharged the rule; first, because, although a faculty ought not to be granted to apply consecrated ground to secular purposes, yet a distinction might be made as to the chapel, being an ecclesiastical purpose; and it was not to be presumed that the inferior court would exceed its jurisdiction and grant the faculty for both the purposes prayed. Secondly, because, in the exercise of its discretion, the Court would not interfere at the instance of a stranger.

RULE, obtained at the instance of Albert Bedford, calling on the Worshipful Sir Travers Twiss, Judge of the Consistory Court of London, to shew cause why a writ of prohibition should not issue to prohibit him from further proceeding in a certain suit instituted upon a petition of the Board of Guardians of the parish of St. Leonard, Shoreditch, praying for a licence or faculty to desecrate and erect certain buildings, being part of a new workhouse, upon a burial ground set apart and duly consecrated for the use of the parishioners of the said parish.

It appeared from the affidavits and petition and counter statements filed therein, that on the 15th of February, 1865, the

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guardians of the poor of the parish of St. Leonard, Shoreditch, filed a petition in the Consistory Court by which they prayed a faculty for the erection of certain buildings for parochial purposes on the burial ground of the parish, alleging, as was the fact, that by certain local statutes certain trustees for the relief of the poor of the parish were empowered to purchase land for the purpose of a burial ground for the parish, and also for erecting a workhouse. The trustees possessed themselves of certain land and erected a workhouse on part of it. In 1778, a certain piece of the above land adjoining the workhouse was consecrated by the then Bishop of London, as a burying place for the use of the parishioners, and it was enclosed accordingly. By the sentence of consecration, the bishop "dedicated the ground for the burial place of the inhabitants of St. Leonard, Shoreditch, and declared the same to be so separated, assigned, dedicated, and consecrated for ever, and that it ought so to remain by this our definitive sentence or final decree."

By 21 & 22 Vict. c. cxxxii. all the parish property was transferred to the board of guardians, and by virtue of the statute the workhouse and burial ground became vested in the guardians, and they had power to enlarge the buildings, &c.

An order of the Poor Law Board was made in 1863 to enlarge the workhouse and build a chapel. For the purpose of carrying out this order, it was proposed to pull down some cottages inadvertently built upon a part of the burial ground, and to build upon other portions a part of the new workhouse, including a chapel for the use of the inmates, which would enable the guardians to erect an infirmary in connection with the workhouse on other ground.

A part of the burial ground had been used for burying paupers, but none had been buried for the then last forty years, and no corpses had been buried in the part proposed to be built on.

On the 7th of January, 1865, by order in council under 15 & 16 Vict. c. 85, it was ordered that burials should cease in this burial ground.

The suit was pending, but no judgment had been given at the time the rule was obtained (21st of April, 1865) (1); but the buildings for which the faculty was asked had been built either before or pending the suit.

(1) The rule has been enlarged from time to time.

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Bedford, at whose instance the rule was obtained, was an entire stranger to the parish, and there was no allegation on his part that he was in any way personally interested in the matter.

Barnard, G. Tayler, and *R. A. Pritchard,* shewed cause. There is no case in which this Court has granted a prohibition under such circumstances as the present, simply because it is sought to apply consecrated ground to secular purposes. *Rector of St. George's, Hanover Square,* v. *Steuart* (1), will be cited contrà; but the prohibition was granted in that case because the rector and the parishioners refused their consent, which of course was necessary, to the building of a school in the churchyard. Here there is no opposition whatever. Many instances have been found in the records of the Diocesan Court of London of faculties granted to apply consecrated ground to secular purposes. (2) In *Pew* v. *Cresswell* (3), a prohibition was granted because title came in question; but it is expressly stated that, as to the interrupting of the use of a churchyard, the matter is of ecclesiastical cognizance. In *Walter* v. *Mountague* (4), the rector of a parish proceeded in the ecclesiastical court against the churchwardens, for opening a footpath across the churchyard, and Dr. Lushington decreed against the defendants; saying:—"With regard to the jurisdiction, the

(1) 2 Str. 1126.

(2) It appeared from affidavits that search had been made in the Records of the Registry of the Diocesan Court of London, and the following licences or faculties had been issued:—On the 27th of May, 1851, a faculty by the bishop of London in confirmation of a decree by his then vicar general, Dr. Lushington, for the erection of a vestry room for vestry and other meetings of the parishioners on the churchyard of St. Mary Abbott's, Kensington, Middlesex, and for confirming the removal of some and authorizing removal of other gravestones, for the purpose of the said erection. On the 14th of March, 1859, a faculty by the bishop in confirmation of a decree of the vicar general Dr. Travers Twiss for erecting on part of the churchyard of St. Botolph, Bishopsgate, London, an infant school for the parish. On the 14th of May, 1860, a faculty for confirming the erection (which had taken place without a faculty) of a national school on the churchyard of St. Mathew, Bethnal Green, Middlesex. On the 9th of October, 1860, a faculty for the erection of parochial schoolrooms on portion of churchyard of St. Sepulchre, London. On the 20th of March, 1861, a faculty for building an enlarged vestry room on part of churchyard of St. James, Westminster. On the 8th of June, 1864, a faculty for the erection of national schools for the parish on part of the lower burial-ground of Christ Church, Newgate Street, London.

(3) 2 Str. 1013.

(4) 1 Curt. 253, 261.

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churchyard being consecrated ground, this Court has cognizance of the matter, and it is my duty to protect it against any unauthorized or illegal conversion whatever; and supposing the alterations were most convenient, still the Court would not sanction them unless the consent of the rector had been previously given, or at least asked;" which shews that that learned judge considered that, with the consent of the rector, a faculty might be granted notwithstanding the consecration. In *Butterworth* v. *Walker* (1), a rule for a prohibition was discharged as not material, on the ground that the object for which the faculty was asked, viz., to erect an organ, was apparently innocent. So in *Bulwer* v. *Hase* (2), a prohibition was refused on the ground that the granting or refusing of a faculty was of ecclesiastical cognizance; and no common law right was infringed. Here the guardians are the owners in fee. Again, assuming that the granting a faculty to desecrate consecrated ground by the erection of secular buildings would be an excess of jurisdiction, one of the buildings in the present case is a chapel; and a distinction has been made between secular and ecclesiastical purposes: see *Campbell* v. *Paddington.* (3) And the Court will not assume that the inferior tribunal will exceed its jurisdiction: *Hallack* v. *Cambridge.* (4) Another reason for refusing the prohibition is, that the applicant Bedford is an entire stranger to the parish, and in no way interested or aggrieved.

Sir J. D. Coleridge, S. G., in support of the rule. No ecclesiastical authority can alter a *definitive* sentence of the ecclesiastical courts, and such is the sentence of consecration. And this is good ground of prohibition. *Rector of St. George's, Hanover Square,* v. *Steuart* (5) is a very distinct authority in favour of granting the prohibition. In *Rector of St. John, Walbrook,* v. *The Parishioners* (6), an application was made for a faculty to convert part of a churchyard into a highway which required to be widened, all parties interested concurring; and the case of *Steeven* v. *St. Martin Orgars* (7) was cited as an authority; but Dr. Lushington refused the faculty, saying: "I think, if my memory rightly serves me, the faculty in

(1) 3 Burr. 1689.
(2) 3 East, 217.
(3) 2 Robert. 558, 560.
(4) 1 Q. B. 593.
(5) 2 Str. 1126.
(6) 2 Robert. 515, 517
(7) 2 Add. 255.

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the case referred to was granted to take down a church in a dilapidated state, without in any way perverting the consecrated ground on which the building stood; the ground was to remain, if I may use the expression, in its state of consecration. A similar faculty was, I remember, granted by Sir Christopher Robinson, when sitting in this chair, in regard to a church in Colchester. . . . I well remember that an application was made to Sir William Wynne, when judge of the Arches Court, to grant a faculty for converting a part of a churchyard at Ewell, in Surrey, into the public road requiring to be widened; and that learned judge refused the motion, stating that nothing short of an Act of Parliament could enable him to accede to the prayer. That dictum has been, to my knowledge, since acted upon, and I consider rightly, in several instances in the dioceses of London and Rochester. I must therefore refuse the present motion." The reporter adds, in a note: "It is presumed that the reason why such an application cannot be granted is, that a sentence of consecration is *definitive*." In 2 Inst. 489, Lord Coke says: "Cœmeterium is derived of the Greek verb *κοιμάω*, that is, dormio, and therefore cœmeterium est quasi dormitorium, quia mortui dormiri dicuntur usque ad resurrectionem." The sentence of consecration by the bishop in the present instance, and the various forms given in 2 Gibson's Codex, appendix, p. 1470 (2nd ed.), Nos. 6, 7, and 8, shew that the ground is consecrated and set apart for ever. The case cited by the other side of *Campbell* v. *Paddington* (1) is very strong against the granting of any faculty in such a case. That was an application for a faculty to build a vestry-room on part of the burial ground of a parish; and Dr. Lushington said: "The Court is at all times reluctant to refuse an application which has received the assent of the parishioners and the patron of the living, who in this instance is the bishop of the diocese; but the Court is nevertheless bound to recollect the limits of its own power and authority. When ground is once consecrated, no judge has power to grant a faculty to sanction the use of such ground for *secular* purposes. The case of *St. George, Hanover Square* (2), illustrates this position. In that case the parish was cited to appear and shew cause why a faculty should not be granted to erect a

(1) 2 Robert. 558, 558. (2) 2 Str. 1126.

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charity school on part of the churchyard; the result was a prohibition. Though the present application is not precisely the same, still it is one involving some difficulty. I have, however, considered the question. It seems to me there is some difference between sanctioning the erection of a charity school and a vestry; a charity school is purely secular; but a vestry-room is of a different character: a vestry-room is employed for *ecclesiastical* as well as secular uses. The Court, taking this view of the matter, will not refuse its sanction to the application. The faculty may be issued; but those taking it must remember that they take it liable to all objections and proceedings which may be raised and had in another court." In the cases produced from the Records of the London Diocesan Court, there appears to have been no opposition, and they are directly contrary to what Dr. Lushington says is the practice. The cases of *Harper* v. *Forbes* (1), and *St. Pancras* v. *St. Martin-in-the-Fields* (2), are recent cases in which Dr. Lushington adhered to his decision that a faculty could not be granted.

[COCKBURN, C.J. Here the building has been done; and the faculty is prayed only to avoid any ecclesiastical censures. If anybody had been aggrieved, this Court might be induced to interfere; but, so far as appears, the applicant is an entire stranger.]

That cannot be denied: the rule was obtained simply to ascertain definitely whether ground once consecrated can legally be appropriated to such purposes as the present; and the last two cases cited are clear on the point, that no faculty can be granted, even if the consecrated ground has already been applied to the use sought to be authorized.

COCKBURN, C.J. We are of opinion that, under all the circumstances of this case, the rule should be discharged. At the same time I do not hesitate to express a very decided opinion that the doctrine laid down by Dr. Lushington (3) is perfectly correct, that when ground is once consecrated and dedicated to sacred purposes, no judge has power to grant a faculty to sanction the use of it for secular purposes, and that nothing short of an act of parliament can divest consecrated ground of its sacred character; and

(1) 5 Jur. (N.S.) 275.
(2) 6 Jur. (N.S.) 540.
(3) In *Campbell* v. *Paddington*, 2 Robert. at p. 559; and the case of *St. John's, Walbrook*, 2 Robert. at p. 518.

the cases before that learned judge, and the case of *St. George's, Hanover Square* (1), are quite sufficient to affirm that as a general proposition. But we purpose to dispose of the present application on narrower grounds. In the first place, the faculty is applied for with reference to two different purposes, to give immunity to the guardians who have already applied the ground to two different uses. One of these is that of erecting a chapel for the inmates of the workhouse; and the distinction taken in one of the cases cited, *Campbell* v. *Paddington* (2), between purposes purely secular and those of an ecclesiastical character, may, I think, be well applied in the present case. Though the erection of schools and an infirmary would not be a purpose for which a faculty could be granted, yet the building of a chapel would be one for which a faculty might be granted. The case of *Hallack* v. *Cambridge* (3) is an authority for saying that where proceedings are pending before the inferior court, having reference to several distinct things, one or more of which is within the cognizance or competence of the court and others are not, this Court ought not to assume that the inferior court will go beyond its competency and jurisdiction; and therefore we ought not to interfere at the present stage of the proceedings. A prohibition may most certainly be applied for as well after as before the granting of the faculty, and if the ecclesiastical court should proceed to pronounce judgment, granting the faculty for all the purposes for which it is sought, there is nothing to prevent a fresh application being made to this Court after such sentence is pronounced.

Another ground upon which this rule ought to be discharged, is upon the distinction which was much relied on by my Brother Blackburn as well as myself in *Forster* v. *Forster* (4), viz., that in the exercise of this jurisdiction by prohibition, the Court will not interfere on the application of a person who is a stranger, and not in any way interested in the subject matter of the suit sought to be prohibited, nor aggrieved by the alleged excess of jurisdiction. That is the case here, the applicant not being a parishioner of the parish nor shewing any interest in the preservation of this church-

(1) 2 Str. 1126.
(2) 2 Robert. at p. 560.
(3) 1 Q. B. 593.
(4) 4 B. & S. at pp. 198, 203; 32 L. J. (Q.B.) at pp. 314, 316.

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yard. He must be taken, therefore, to have come here to try the abstract question whether a churchyard once consecrated can be applied to secular purposes. What has now fallen from the Court, following the case in Strange, and the judgment of one of the first lawyers that ever sat in a court of justice, Dr. Lushington, will be sufficient to satisfy him and every one else, that nothing short of an Act of Parliament can authorize the conversion of consecrated ground to secular purposes, or enable persons, although they may be the owners of the soil, to remove bodies from consecrated ground. What, however, has been done in the present case has been done inadvertently, without any intention of violating the law and without outraging the feelings of individuals, and looking therefore to all the circumstances of the case, I think the rule may well be discharged.

HANNEN and HAYES, JJ., concurred.

Rule discharged.

Attorneys for applicant: *Mills & Lockyer.*
Attorney for guardians: *Henry Child.*

April 23.

DENT AND OTHERS *v.* SMITH, P. O.

Ship and Shipping—Marine Insurance—Warranty of Nationality of Ship—Perils of the Seas—Sum paid under Decree of Foreign Court, to regain Goods—General Average—Salvage—Jurisdiction of Local Court in case of Wreck.

The plaintiffs effected a policy of insurance in London with the defendants, on "five boxes of bar gold in the ship called the *Dutchman*, at and from London to Constantinople, including all risks from the Bank of England until safely delivered to the consignees at Constantinople." The perils insured against were the usual perils, including of the seas, with the usual suing and labouring clause. At the time the insurance was effected the *Dutchman* was an English ship, but she was transferred the next day to Russian owners, and was duly certified and became a Russian ship; neither the plaintiffs nor the defendants were aware of the change until after the voyage was at an end. The ship sailed with the gold and other cargo on board, and was stranded in Turkish territory, about 100 miles from Constantinople, and within the jurisdiction of that port. The gold was immediately landed by the captain, and deposited with the Russian consul; and the consignees were compelled in order to obtain it to make a deposit of 20 per cent. upon the gold, as security for the payment of any sum that might be awarded against them as average or salvage expenses by the Russian consular court. In Turkish territory, by capitulations with the Great Powers, all matters touching ships and their

cargoes are decided by the consular court of the country to which the ship belongs. After the gold had been landed, operations were commenced to get the vessel off, which proved ineffectual. But most of the cargo was saved, and many parts of the fittings of the ship. According to the practice, the Russian consul appointed a curator of the wreck; and three persons were appointed by the Russian consul to decide upon the average to be paid by all parties concerned. They found it not a case of average, but a case of salvage, and they awarded that the cargo, including the gold, must contribute to the expenses in certain proportions according to the value; and this threw by far the greater part of the expenses on the gold. The agents of the plaintiffs and defendants protested against the award, as the gold had been landed before any of the operations had been commenced; but the award was ratified by the Russian minister at Constantinople, and no notice of appeal to the court at St. Petersburg having been lodged within eight days, it became a definitive judgment binding on all parties. Had the ship remained under the English flag, the expenses would have been adjusted according to English law, and a great part of the sum charged against the gold would not have been charged.

The plaintiffs, having been thus obliged to pay the sum awarded against the gold, brought an action to recover a proportionate part of it from the defendants, as a partial loss by the perils insured against. In addition to the above facts, contradictory evidence was given as to what principle had been adopted in the award, and as to whether or not the proper law had been followed in the decree of the Russian consular court:—

Held, 1. That the fact of the change of nationality of the ship could not affect the contract of insurance, as there was no express warranty or condition in the policy that the ship should continue English, and such a condition could not be implied.

2. That it was unnecessary to go into the question of whether or not the judgment of the Russian consular court was strictly according to the law administered in that court; the ship having been wrecked, the consequence was that the gold had got into the hands of the Russian authorities, and in order to get it back the plaintiffs had been compelled to pay the sum claimed, and this was the immediate consequence of the wreck; and the plaintiffs were, therefore, entitled to recover the money as a loss by perils of the sea.

3. That the plaintiffs had done all that a reasonable uninsured owner would have done, and were not bound to have appealed to the court at St. Petersburg.

THIS action was brought to recover 1108*l.* 3*s.* 3*d.*, as the proportion payable by the Marine Insurance Company (of which the defendant is the public officer), under a policy of insurance dated the 26th of November, 1858, and made between the plaintiffs, as agents for Teffik Pasha, the minister of finance to the Sultan of Turkey, and the company, whereby the sum of 10,000*l.* was insured upon five boxes containing bar gold, the property of Teffik Pasha, of the value of 52,000*l.*

The defendant paid into court 384*l.* 12*s.* 3*d.*, as sufficient to

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satisfy the claim of the plaintiffs, and to this the plaintiffs replied that it was not sufficient.

At the trial, a verdict was taken by consent for the plaintiffs for the amount claimed, subject to the opinion of the Court upon a case; the case and appendix were of enormous length, the following are the material facts:—

1. The plaintiffs, Messrs. Dent, Palmer, & Co., acting as agents for Teffik Pasha, the finance minister of the Sultan of Turkey, in November, 1858, made arrangements with the owners of the British steamship, the *Dutchman*, then in the port of London, and about to sail to Constantinople, for the conveyance on board the vessel from London to Constantinople of five cases of bar gold, to be consigned to Teffik Pasha.

2. The plaintiffs thereupon effected with the defendant's company, on behalf of Teffik Pasha, a policy of insurance, dated the 26th of November, 1858, to the amount of 10,000*l.*, "on five boxes containing bar gold, value 52,000*l.*, in the ship or vessel called the *Dutchman*, whereof J. Kavanagh is at present master, or whoever shall go for master in the said ship or vessel, lost or not lost, at and from London to Constantinople, with leave to call at Havre and intermediate ports, including all risks from the Bank of England until safely delivered to the consignees at Constantinople." The perils insured against were, "of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests and detainments of all kings, princes, and people, of what nation, condition, or quality soever, barratry of the master and mariners, and all other perils, losses, misfortunes that have or shall come, to the hurt, detriment, or damage of the aforesaid subject matter of this insurance, or any part thereof. And, in case of any loss or misfortune, it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the capital, stock, and funds of the company, in proportion to the sum hereby insured."

3. The *Dutchman* was, on the 22nd of November, 1858, entered outwards at the custom house as a British ship, by the name of

the *Dutchman*, for the ports of Malta, Smyrna, Constantinople, and Odessa.

4. On the 27th of November, 1858, the owners of the *Dutchman* executed a bill of sale purporting to transfer her to a Russian company, called the Russian Steam Navigation and Trading Company, the principal office of which is at Odessa. There exists no means in England of registering as a Russian ship a ship bought in England by a Russian subject, and in such case, according to Russian law, a certificate is given to the purchaser of such ship by the Russian consul-general in England, entitling such ship to all the privileges of the Russian flag.

5. On the 29th of November a certificate was, accordingly, signed by the Russian consul-general, sealed with the consular seal, and delivered to the manager of the Russian company some time between the 29th of November and the sailing of the ship, by which the ship *Dutchman*, "henceforth called *Dnieper*," was certified to be, and to have the privileges of, a Russian ship.

6. On the 1st of December, 1858, the British certificate of registry of the vessel was delivered up at the custom house at Waterford, the port to which the steamer belonged, and cancelled, the following entry being made in the registry book by the registrar:—"Custom House, 1st December, 1858. Certificate of registry delivered up and cancelled this day, the vessel having been sold to the Russian Steam Navigation and Trading Company of Russia."

7. The five cases of gold were loaded on board the steamer *Dutchman* under a bill of lading dated the 4th of December, 1858.

8. On the 6th of December, 1858, the ship was entered outwards, and was also cleared outwards, for the same ports of Malta, Smyrna, Constantinople, and Odessa, as a Russian vessel, by the name of the *Dutchman*, and on the same day the crew were called upon to sign fresh articles.

9. Neither the plaintiffs nor the defendants knew, until after the termination of the voyage insured, that the *Dutchman* had ceased to be an English vessel.

10. The steamer, with the five cases of gold, and with other cargo on board, sailed from London on the 8th of December, 1858,

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and, on the 4th of January, 1859, whilst proceeding on her voyage, was stranded on the Dohar Aslan shoal, which is 110 miles from Constantinople, and two and a half miles from Gallipoli. What then occurred is correctly described in the following extract from the protest of the captain:—"The fore compartment immediately commenced filling with water. I ordered the engines to be reversed, in order to endeavour to get the ship off, but finding that of no avail, and the water fast gaining on the pumps, I ordered the boats out, and sounded round, gave orders to the chief officer to get out anchors astern; was then informed that the main hold was fast filling, and, being afraid that if she got off the shoal she would founder, this order was countermanded, sending at the same time the chief officer, with two female passengers, and the specie, amounting to upwards of 50,000*l.*, to Gallipoli, in order to seek all possible assistance from the Russian consul."

11. The specie mentioned in the foregoing extract was the gold in question, and was so placed in the ship's boat within about two hours after the ship had struck The chief officer proceeded to Gallipoli, and there landed the five cases, and deposited them on the same day in the care of the Russian vice-consul at that port. The gold remained in his charge for twelve days, and the fees demanded upon delivering it up, as hereinafter stated, were $2\frac{1}{2}$ per cent. upon its value.

12. In the same boat the captain sent a letter for Henry Lamb (who had been agent at Constantinople for the former owners of the vessel, and who afterwards acted there for the Russian Steam Navigation and Trading Company), and also to the Russian consul at Gallipoli, informing them that the vessel was stranded, and requesting assistance. The assistance asked for was sent, and arrived as in the next paragraph mentioned; but, at the time the gold was deposited at the Russian consulate at Gallipoli, as already mentioned, no expenses had been incurred in saving the ship, or any part of her cargo.

13. On the 5th of January, one Richard Greck, the commander of a steam-tug, arrived at the ship, having been sent to her assistance by the Russian consul at Gallipoli, and, on the same day, he and the mate held a survey, which was reduced into writing, and by which they recommended that as much of the cargo as possible

should be removed, which operation they thought might enable measures to be taken to save the ship.

14. On the 8th of January, 1859, Lamb, and T. N. Black, Lloyd's agent at Constantinople, and a Russian official, known as the Russian harbour-master, arrived in the steam-tug *Sylph*, from Constantinople, at the wreck. In consequence of the prevailing bad weather, it was not until the 11th of January that a survey of the steamer could be held, after which survey the captain entered into an agreement with Greck for saving such cargo as was then on board, and, if possible, the hull of the steamer. This agreement was approved of and signed by Lamb, as agent of the ship. Under this agreement a considerable quantity of goods, and also some part of the hull, stores, and rigging of the ship were saved and landed.

15. Lamb, on his return from Constantinople from Gallipoli, addressed a letter to the Russian consul-general at the former port, a translation of which is as follows:—

Constantinople, January 14, 1859.

Statement of Henry Lamb, Agent of the Russian Company's Steamer on the London Line.

That the steamer *Dnieper*, Captain Kavanagh, whilst on its voyage from London to Constantinople, was stranded on the 4th day of the present month on the shoals of the Dohar Aslan, near Gallipoli, as shewn in the documents drawn up in the Chancellerie at Gallipoli; that immediately on hearing thereof I proceeded to the locality, and took steps for the salvage of the cargo, and if possible the hull of the vessel, machinery, and tackle; that I have this day landed a quantity of goods, and moreover five cases (containing as said 50,500*l.* sterling), and deposited the same in the hands and custody of the vice-consul of the Emperor of Russia, Mr. Fenton, of Gallipoli. In my capacity of agent, and on the ground that it is incumbent on me to forward to Constantinople the aforesaid cases of gold, as well as the salvage goods, I request that the aforesaid Mr. Fenton, vice-consul, be authorized and enjoined to hold at my disposal, or else at the disposal of Captain Kavanagh, the said five cases of gold, as well as the goods which may be already or which may be hereafter saved.

16. The five cases of gold were in fact landed and deposited at Gallipoli in manner mentioned in paragraphs 10 and 11, without intervention on the part of Lamb.

17. On the same 14th of January, Lamb signed an undertaking

As agent of the Russian steamer, the *Dnieper*, to be responsible to the general consulate of Russia for all the charges and expenses of the consulate, both at Constantinople and at Gallipoli, with reference to the said steamer and cargo. I engaged to make a note of the goods saved before the arrival at Gallipoli, through

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the intervention of Messrs. Fenton and Jourdan, in order that these might receive what they are entitled in law to claim.

18. Both these documents were sent to the Russian ambassador by the consul.

19. The Russian ambassador, on the 18th of January, 1859, communicated with the vice-consul at Gallipoli, authorizing him to give up the boxes to Lamb.

20. Lamb thereupon proceeded to Gallipoli, and brought the five cases of gold to Constantinople in the steamer *Kertch*, a vessel belonging to the Russian Steam Navigation and Trading Company, the freight charged upon the gold by the company being at the rate of $\frac{1}{4}$ per cent., and deposited the gold with the Russian consul general.

21, 22. On the 21st of January, Lamb obtained from the consul general, in consequence of his request, authority to deliver up the merchandize on board the *Dnieper* to the owners, on deposit by them of 20 per cent. on the value of the respective goods.

23. At the request of Lamb, surveyors were appointed by the consul general in order to verify minutely, in all visible parts, the condition of the vessel, its machinery accessories, and to average, if possible, the losses and the state of its immersion, by means of divers, and of every possible internal inspection, and with communication with the parties in their respective capacities, to express the opinion whether that steamer is capable of being raised, or in any case, affirmatively or not, to suggest the measures to be taken, producing in due time their detailed report to this consular office; to survey and report on the state of the vessel, and the propriety of taking proceedings to raise her. The appointment was on the date thereof, 15th of January, 1859, communicated to Black, then being Lloyd's agent at Constantinople, and Fortune Jourdan, the representative there of the French insurance companies.

24. Lamb was, at his own request, on the 28th of January, appointed an officer under the name of curator by the consul general of Russia.

25. On the 31st of January, 1859, the surveyors nominated as in paragraph 23, reported that the vessel might probably be set afloat by certain operations, but that the expense would be so great that they had better not be attempted.

26—31. After some correspondence the five cases of gold were in February, 1859, delivered by Lamb, the curator, to the Ottoman Bank, as agents for the consignees, and the bank carried 10,100*l.* or 20 per cent. upon the value of the gold to the credit of an account with the curator, to be held by them at his disposal, as provisional contribution of the gold, valued at 50,500*l.*, such contribution to be ascertained and settled on the adjustment of the general average.

The bank also signed the following average bond :—

Steamer *Dutchman* or *Dnieper*, of London, wrecked near Gallipoli.

We, the undersigned, consignees of the goods of the above steamer and goods which have been conveyed after the salvage to Constantinople, undertake to pay the expenses incurred thereby, and to submit to the general and particular average, to be drawn up either here or at London.

32. The whole of the expenses incurred in relation to the gold in question, from the time of its being sent ashore in the ship's boat to the time of its being so duly delivered to the bankers of the Turkish Government, amounted to the sum of 1183*l.* 11*s.*

33. By an instrument dated the 4th of March, 1859, the Russian consul general, on the application of Lamb, appointed three experts, of whom Joseph Paulaky was one, to "classify and determine the averages" of the wrecked steamer.

34. The first information relative to the steamer arrived in England in February, 1859, and the plaintiffs immediately communicated the information to the underwriters.

35—42. Lodge, the secretary of the defendant's company, was appointed to act for all the underwriters on the gold, and a correspondence ensued between Lodge, Robinson (the agent in London of the shipowners, the Russian company), Black (Lloyd's agent at Constantinople), and Lamb, in which correspondence the plaintiffs took part. After a time it was agreed that the matter should be left in the hands of Lodge, and after the 4th of April, 1859, the plaintiffs did not further interfere in the matter until the year 1861, as appears in paragraph 49.

43. Lodge did all in his power to have the adjustment of the average made out in England, and caused notice to be given to Lloyd's agent, to Lamb, to the Russian consul, and to the persons appointed as aforesaid to adjust the average, that no adjustment

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would be recognized unless made out according to English law and practice.

44. On the 22nd of February, 1861, the experts made a statement, which judgment or statement was, on the 28th of February, ratified or "homologated" by the Russian minister at Constantinople. A translation of this document was made part of the case. It was of immense length; and first minutely recited the facts of the wreck and subsequent proceedings, and then proceeded to state the law as follows:—

Whereas the disaster which befel the steamer *Dnieper*, alias *Dutchman*, at Dohar Aslan, near Gallipoli, so far from constituting a case for an arrangement of averages, is one requiring a settlement of salvage, inasmuch as the vessel being entirely lost, all the steps and trouble taken, and all the expenses incurred, could have no other object in view than that of recovering the cargo, and the remains of the vessel, after the attempts to set it afloat again, that consequently the general amount of the salvage expenses should be divided into three heads, one comprising the expenses proper of the salvage of the effects and remains of the vessel, the other those exclusively incurred for the salvage of the cargo, and the third the expenses in common; that is to say, those incurred at the moment of the mishap, with the view of saving the ship and the cargo, the expenses referred to under the third head to be divided in due proportion, and to be added partly to the expenses of the first head, namely, to the charge of the remains of the vessel, and partly to those of the second head, namely, to the charge of the goods recovered.

Whereas, with respect to the recovery of the goods forming the cargo of the wrecked vessel, the very urgency at the moment of the disaster of anxiously labouring to effect a salvage, creates a necessary partnership amongst all the owners of the goods to be saved, with reference to the contribution of the expenses of recovering said goods; that contribution should be duly levied in proportion to the value of the goods recovered, without reference to the greater or lesser amount of expense required by any part of the goods compared with others, because the community of danger and the community of interest in the salvage, constitute the basis of equality of the silent and necessary partnership in question, in effect at the moment of the disaster, efforts are made to recover whatever can be saved, and there may be goods more easy of recovery and at less cost, whilst more trouble is requisite for and consequently more expense incurred in, the salvage of other goods; but that is an incident which cannot lead to any deduction, because the salvage partnership being constituted at the very moment the shipwreck occurs, and consequently before the salvage operations commence, whatever may be the nature of those operations, all that has been done in connection with that necessary partnership, should be regulated in conformity with the basis of the partnership itself, said basis requiring that the expenses be in common, and divided amongst the owners of the goods saved in proportion to the respective value of said goods.

Whereas the contribution towards the salvage expenses is due by virtue of a real event, one of the advantages of those who have incurred those expenses, inas-

much as the goods have been saved through said expenses without any other consideration; with respect to the owners of the goods, it results that the salvage goods, or the produce thereof in case of sale, should be held as security for that class of creditors, and as in the case of average it is the opinion of all the writers on law that the action of contribution is real, such is the case also with respect to salvage, for in both instances the sacrifices and the expenses have been incurred for the purpose of saving the objects in question.

Whereas, in this particular matter five cases containing ingots of gold, of the value of 50,540*l.*, were amongst the salvage goods of the *Dnieper*, that amount should, according to the principles already pointed out, contribute towards the total amount of the cost of salvage of the goods.

The experts then found that the value of the cargo saved, other than the gold, amounted to the sum of 12,154*l.* 7*s.* 2*d.*, and that the total expenses of saving the cargo, in which they included the expenses relating to the five cases of gold, and a commission of 1 per cent. to Lamb on the value of both the gold and the other cargo, amounted to the sum of 5381*l.* 16*s.* 7*d.*, and to this sum they added, under the head of legal expenses, the sum of 1767*l.* 9*s.* 6*d.*, making a total of 7149*l.* 6*s.* 1*d.*

The following are the particulars of this sum of 1767*l.* 9*s.* 6*d.*:—

	£	*s.*	*d.*
Russian consulate fees	13	0	0
To agents of English and French assurers, ½ per cent. on the assessments	313	5	4
To the three regulating or assessing judges, 1½ per cent. on the amount of the assessments . .	939	16	2
To barrister for consultation, attendance at sittings, &c., ½ per cent.	313	5	4
To the accountant for drawing up the statement .	156	12	8
Copyist for four copies	30	0	0
To the Exchange where the meetings were held .	1	10	0
	£1767	9	6

The experts further decided, as above recited, that the gold should form a contributory interest in the same manner as the rest of the cargo; and they assessed the sum of 5762*l.* 8*s.* 7*d.* as the rateable proportion of the said sum of 7149*l.* 6*s.* 1*d.*, payable by the gold.

45. It is admitted for the purpose of the argument of the case, that had the ship remained under the English flag, the adjustment of any general average or salvage charges would have been made out according to English law and practice, and none of the per-

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centage commissions charged under the head of legal expenses would have been incurred.

These percentage commissions are charged upon the value of such interests as the experts found to be contributory interests.

46. The ship was stranded within the jurisdiction of the port of Constantinople.

47—49. In August, 1861, the Turkish minister of finance communicated with the plaintiffs as to the deposit of 10,100*l.*, and this letter was handed to Lodge, who wrote and explained that the underwriters on the gold protested against any claim at all.

50—52. In November, 1863, Lamb, as curator, was compelled to pay certain sums out of the 10,100*l.* to the consul general of Russia, by a decree of the English consulate.

53. The balance of the 10,100*l.*, remaining in the hands of Lamb, was paid over by him to the Turkish minister of finance.

54, 55. The proportion, in respect of the sum insured by the defendant's company, of the money charged upon the gold and paid by Lamb is 1108*l.* 3*s.* 3*d.*, which, after deducting the sum of 384*l.* 12*s.* 3*d.* paid into court, leaves a balance of 723*l.* 11*s.* still claimed by the plaintiffs and unpaid, together with interest thereon.

The question for the opinion of the Court was, whether the defendant's company are liable under the policy for the sum of 723*l.* 11*s.* over and above the sum paid into Court. If the Court should be of opinion in the affirmative judgment was to be entered for the plaintiffs for the said sum of 723*l.* 11*s.*, with such interest, if any, as the Court might direct.

The Court was to be at liberty to draw any inference of fact that a jury might have drawn; and, inter alia, extracts from depositions taken at Constantinople under a commission were set out at length in an appendix, and were to be referred to; of these the principal which were necessary to the argument of the case were as follows:—

Extracts from the Interrogatories administered to witnesses examined at Constantinople on the part of the plaintiffs.

1. What is your business profession or occupation, and how long have you been engaged in the same, and where?

16. Is there any public law or usage in force in the district in which the ship was wrecked and the cargo saved regulating or relating to the mode of statement and adjustment of average losses and salvage amongst the parties interested therein,

and if so, is it the Turkish law or usage, or what other law or usage, and where and in what tribunals is the same administered?

17. Is there, according to the said law or usage, an established and authorized mode of proceeding to have the average statements adjusted according to the law applicable to the particular case, and if so, state what that mode of proceeding is, how and where commenced and terminated, and what is the force and effect of the judgment, statement, or decision arrived at?

23. Assuming the ship to have been Russian—owned at the time of the wreck, and that the port of destination of the bullion was Constantinople, according to the rules of what law is the average statement made, and the liabilities of the various parties interested regulated, at such port of Constantinople?

24. State fully what the law is, so far as it is necessary, with reference to the case of the ship *Dnieper* or *Dutchman*, setting out where necessary what you assume to be the facts.

25. Direct your attention to the judgment and statement of average put in evidence under this commission, and state whether, in your opinion, the law as stated therein is correct, and add thereto any further explanations as to that law applicable to the case of the ship *Dnieper* or *Dutchman*.

Extracts from Cross-interrogatories administered on behalf of the defendant.

6. In what books is any such law as that which you have stated in your evidence in chief to be found, and state whether such law is uniform and applicable alike to all ships?

7. In what country or countries does the law of which you have spoken prevail?

Extract from Depositions of witnesses examined at Galata on behalf of the plaintiffs.

[*The numbers refer to the interrogatories.*]

RICHARD ROUTH, of Galata, of Constantinople, aged fifty-six:—

1. I am an advocate of general practice for the last nine years and a half in the English, European, and Ottoman courts, and have resided in Turkey for the last twenty-five and a half years.

17. General averages are adjusted according to the law of the country whose flag the ship carries, excepting as regards the fees of the adjusters, solicitors, &c., which are governed by local usage. The force and effect of the judgment, statement, and decision arrived at is, that if homologated by the respective authority, it becomes a res judicata.

23. I presume the Russian law, but sometimes French law is used in regulating averages.

Vivâ voce Examination.

Q. Does the Russian jurisdiction extend to both vessels and cargo wrecked on Turkish coasts, if under the Russian flag?—*A.* Certainly.

Q. By what authority is such jurisdiction conceded to the Russian Government over vessels bearing the Russian flag, but wrecked on Turkish coasts?—*A.* By the capitulations.

FORTUNA JOURDAN, of Galata, aged thirty-four:—

1. I am representative of the French insurance companies and average-stater for

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the last eight years at Constantinople, and previously on the committee of the French insurance companies at Marseilles at the Bureau Contentieux.

16. There is but one mode of regulating average losses and salvages in Turkey. Each consulate has an exclusive jurisdiction over its own subjects and vessels carrying its flag, and the same is administered in their respective courts or consulates.

17. It is the usage here to follow the law prescribed by the Code de Commerce Français in regulating averages or salvages by any vessel except English, which would differ from the French as to the contribution from the vessel and freight; by the English law the vessel having to contribute for the whole amount of the value less charges, whilst by the French law it only contributes one-half. Each consulate has its own mode of procedure, and in the Russian court it is as follows:—In case of wreck occasioning a case of salvage, the Russian chancellerie appoints a curator, whose duty is to superintend the salvage operations, and to pay all the expenses incurred, to sell the goods, if necessary, to deliver to the consignees their goods, if the consignees will accept them, on their undertaking to pay the contribution to the expenses which shall be fixed by the règlement against the merchandize. When all the operations are concluded, the curator applies to the Russian chancellerie for a commission, consisting of three persons generally, to be appointed to regulate the salvage with the assistance of an avocat, the agents for the underwriters also intervening. The règlement concluded and homologated by the authority, it is the duty of the curator to settle definitely all accounts connected with the salvage. This judgment, unless appealed against, is binding upon all parties, and is communicated to those interested. The fees in the Russian consulate are the following:—The fee to the regulateurs was formerly 3 per cent., and since about five years has been reduced to 2 per cent. The curator receives a fee of 2 per cent., and the avocat 1 per cent., and the agents of the underwriters 1 per cent. These percentages are charged on the value of the merchandize saved.

18. There were proceedings taken for the settlement of the average statement; I intervened on the part of the French underwriters, and protested against the règlement being made in London, as required by the parties in London.

23. According to the usages of the Russian Chancellerie, which are based on the French law.

24, 25. The law applied in the règlement is perfectly correct according to the French law and jurisprudence. With regard to the contribution, it is rightly applied, because in cases of wreck the danger being common to all the merchandize, all the merchandize indiscriminately ought to contribute according to its value as saved. Whether goods of a small value are saved at great expense, or goods of large value are saved at small expense, all have to contribute at the same pro ratâ.

Answers to Cross-interrogatories.

6. In the Code de Commerce Francais, and in the French Jurisprudence. In general here all the chancelleries, except the English, adopt the French law in maritime cases.

7. In France and in all countries which adopt the French law.

Vivâ voce Cross-examination.

Q. Did the hull of the *Dnieper* contribute to the general average?—*A.* It paid a contribution of 20 per cent. on the materials saved, but none upon the hull and engines that were abandoned.

Q. Were you aware that the average bond which was signed by you provided for the statement being made in London or here, and whether it was not greatly to the advantage of all parties, or at least the majority, that it should be made in London?—*A.* I do not know whether it was to the advantage of all parties that the average statement should have been made in London; but I contended on principle that it was illegal that it should be made out in London, and this is the reason for which I protested against the demand of Mr. Robinson and others.

Q. In what manner was it illegal towards the English shippers who had put their goods on board the English ship *Dutchman*?—Because, according to the law, the average statement should be made out at the port of destination, and not at the port of embarkation, whatever be the nationality of the ship.

Q. Were you served with a copy of the règlement, and was there any means of appeal against the same, and did you so appeal?—*A.* I received a copy of the règlement, and there were means of appeal, and it is for that purpose that it was communicated; but I did not appeal.

Q. Give the law of the country upon which the règlement is founded?—*A.* On the French law.

Q. Refer to the authorities by which it is held that the owners of goods on board a wrecked ship are bound to pay for the expenses of saving, or endeavouring to save, the goods of other parties?—*A.* By the Code de Commerce Maritime Français. There is no special clause for cases of salvage, but it is by assimilation to general average that the salvage expenses are settled.

Q. What is the difference between general averages and salvage? Describe the law applicable according to each and every country with the laws of which you are acquainted?—*A.* General average is when expenses or sacrifices are incurred for the joint benefit of ship and cargo. In case of salvage there is no community between ship and cargo, but there is a community of interests between all the goods alone, and this is a general principle of law.

Q. According to the law of what country or countries do you say that the law as stated in the average statement is correct?—*A.* It is according to the principles of the French law and the French jurisprudence.

JOHN ANTOINE SIVORI, of Galata, of Constantinople, aged fifty:—

1. I am an avocat, and have practised as such for the last three years in Constantinople. I have practised as such elsewhere. Since 1838 I have been partner with the late Mr. Tacchella, who drew the "Jugement de Sauvetage" of the *Dnieper*.

16. Gallipoli is a dependency of Constantinople, and at Constantinople the subjects and vessels of each nation are by the capitulations with Turkey subject to the jurisdiction and procedure of the consulate to which each belongs. By the terms of the capitulations it is established that every power exercises general jurisdiction over its own subjects and vessels. Civil and commercial questions between Turks and Franks are judged in the Turkish court before a mixed commission of Turks and Franks. In maritime cases, such as salvages and averages, since the representation of the Europeans in Turkey, the Turks have submitted themselves, except in their own vessels, to the decisions of the European tribunal of the consulate of the flag of which the ship belongs. In questions between Franks and Franks disputes are settled in the Consular Court of the defendant.

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17. Each consulate has its own jurisdiction and procedure; the Turks and all the consulates, with the exception of the English, adopt the Code de Commerce Maritime de France as the basis of their judgments. The general mode of procedure and that adopted in the Russian Court is first, a protest and an extended protest, then survey or surveys, after which a curator is appointed who pays expenses, and does what is best to save ship and cargo, or realize the same; the documents and accounts are then placed in the hands of three adjusters (or regulateurs) appointed by the consul of the flag to regulate the average or salvage, which statement is charged pro ratâ upon the ship and cargo. The judgment is then deposited in the consulate, homologated by the authority, and sent for execution with all the authority of a judicial sentence. Upon being served upon the parties interested or their representatives, they have, in a Russian case, eight days within which to give notice of appeal should they feel themselves aggrieved, and then six months within which they must file a petition at St. Petersburg. In case of no appeal the sentence or judgment is definitive and binding upon all parties.

23. Assuming the ship to have been Russian-owned, it is the custom of the Russians in all such cases happening at Constantinople, to adopt the French law with the mode of procedure used in the Russian consulate. The French and Russian codes are nearly one and the same thing.

25. I have seen the règlement or judgment of the *Dnieper*, and so far as the law is concerned it is correct in my opinion, and they applied the correct law. The articles which govern the case are 350, 369, and 381 in the Code de Commerce Maritime de France, as well as the 385th mentioned in the judgment. These articles have been applied, because, in my opinion, it is a case of salvage and not of average. The agent of the insurers having interfered for the salvage of the goods, the underwriters have virtually accepted the abandonment, and have accepted the consequences of the salvage.

Answers to Cross-interrogatories.

6. In the Code Napoleon on maritime law, except in English vessels, it is the customary law applied to all ships at Constantinople and the Levant.

7. In France it prevails as their own law, and here by usage and custom specially for maritime cases, and this for want of any local law with the exception of English vessels.

Vivâ voce Cross-examination.

Q. Referring to your answer to Interrogatory No. 25, what are the consequences referred to, and especially as to the goods saved, and whose expenses are known and separate from all others?—*A.* These goods must contribute to the salvage expenses as well as all others, because according to jurisprudence, in cases of wreck a natural partnership is formed between the goods, and all have to contribute one with the other.

Q. In what books of law and authority is such doctrine of jurisprudence contained?—*A.* Generally in all writers on French law, and specially in Dalloz, Pardessus, Boulay-Paty.

Q. What is the Russian law as to general average and salvage?—*A.* It is nearly the same as the French law.

Q. Is an Englishman, Frenchman, Turk, or Italian, bound to submit to the jurisdiction of the Russian consul at Constantinople, and give the law by which

he is so bound?—*A.* Yes, if it is a Russian ship by the capitulations and by the Roman principle, "Actor sequitur forum rei."

Q. What is the difference between general average and salvage. Describe the law applicable according to each and every country of which you are acquainted?—*A.* General average is when the goods remain the property of the shippers, whereas in salvage by the abandonment they become the property of the underwriters. This is according to the spirit of the Art: 369 and 401 of the Code de Commerce Maritime de France, and all laws based on the Roman law.

DIDACO PELLIGRINI, of Galata, of Constantinople, aged fifty-one:—

1. I am an avocat practising for the last twenty-eight years, and since 1848 in Constantinople.

16. Answer agreeing with the depositions already given.

17. Describes the course of procedure in accordance with Jourdan's and Sivori's statements above.

23. According to Russian law.

25. It is a case of salvage. The règlement is made according to the practice in salvage matters by the late Mr. Tacchella, who was the regulateur of all maritime cases in the Russian, Sardinian, Dutch, &c., consulates, as the late Mr. Black was for the English. No particular law is applied in this case. It is only the system or usage usually applied to similar cases in this district.

Answers to Cross-interrogatories.

6. In the book called "Concordance entre les Codes de Commerce ètrangers et le Code de Commerce Français," of A. de Saint Joseph, edited by Delamotte. It is alike applicable to all Russian vessels, but here there is no special law applied, there being a customary practice according to which règlements are made. French law is the basis of this customary practice.

Vivâ voce Cross-examination.

Q. What is the law of Russia as to general average and salvage?—*A.* Russia has its own code, which is epitomized in the concordance of A. de Saint Joseph above mentioned.

Q. Give the law of the country upon which the statement per *Dnieper*, or *Dutchman*, is founded.—*A.* On the usages of this place, and on the "Droit des Gens (naturel)," as to partnerships, the principle of which is applied to cases of salvage.

Q. Refer to the authorities in which it is held that the owners of goods on board a wrecked ship are bound to pay for expenses of saving, or endeavouring to save, the goods of other parties.—*A.* Dalloz, Repertoire, Vol. Droit Maritime, verbo Avaries, verbo Sauvetage.

JOSEPH PAULAKY, of Galata, of Constantinople, aged forty-four:—

1. I am a merchant, and have been partner in the house of Messrs. T. N. Black & Co. since 1859.

16 and 17 agree as to the course of procedure with Jourdan's and Sivori's evidence.

18. Proceedings were taken for settling the average statement of the *Dnieper*. Captain Kavanagh having made his protest, Mr. Henry Lamb, the agent for the

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vessel, was appointed curator. The consul then named the surveyors, who made their report that as much of the cargo should be saved as possible, and advised the abandonment of the vessel on account of the great expenses in any attempt to raise her. During these operations the agent for the insurers upon the hull of the vessel sent out an engineer from Paris, Mr. Lisignol, who believed he could save the vessel, and caused great delay and expenses in his attempt to do so. He demanded a second survey from the Russian consulate, stating the vessel was badly constructed and overladen. The surveyors on this survey reported that the vessel was well constructed. Afterwards the storms from the south broke her to pieces, and shortly after she became a perfect wreck. Together with Mr. Zacharie Zacaroff, a Russian subject, Mr. Yugovich, the Russian harbour-master, I was appointed regulateur by the Russian consulate to draw up the judgment and règlement de sauvetage. I was appointed by the consul on account of my connection with Mr. Black as Lloyd's agent. We, the regulateurs, proceeded to examine all the accounts contained in the annexes to the règlement, and after taking the opinion of MM. Morchio and Tachella, the principal avocats in this place, we made the judgment according to the best of our ability and judgment. This judgment was subsequently homologated by Prince Sabarron, the then Russian minister at the Porte. I am certain that no one ever appealed against the judgment as homologated.

23. According to the Russian law.

24. We could not find in the Russian books the law exactly governing this case, and in the absence of Russian avocats at Constantinople we have adopted the advice of the most experienced avocats in maritime law in this place, and, adopting the general usage of Constantinople, have adopted the French code.

25. I cannot give any strictly legal opinion, as I am only a merchant. We followed the advice of the avocats we consulted on this case, and, besides, the material impossibility of keeping a separate account for each class of goods which was lost or damaged rendered it necessary to decree a contribution from all. One of the reasons we decreed the gold should contribute was this: we considered the captain (having given his sole attention to the saving of the gold when the ship's boat was alongside) for that time directed his attention from the rest of the cargo, some of which might have been saved in the place of the gold. The danger to which all the cargo was mutually incident caused, in our opinion, the necessity that all the cargo should mutually contribute. In case of wreck it is the duty, we consider, to save the most valuable first, in order to diminish the general loss to the advantage of all.

Vivâ voce Examination.

Q. In your reply to Interrogatory 25, you speak of the material impossibility of keeping a separate account for each class of goods which was lost or damaged, rendered it necessary to decree a contribution from all; what would be the effect could such account be kept separate upon the whole or any part of the cargo?—*A.* The effect of it would have been that goods saved and not of any value, but for the saving of which great expense had been incurred, would not pay their own expenses or a portion of them.

Q. Upon what law is such opinion founded?—*A.* All the laws—English, French, Italian, Russian, and all I know in general.

Q. Referring to same reply to Interrogatory 25, state to what extent you considered the captain as giving his sole attention to the saving of the gold; whether

it was not his first object to place his female passengers in a position of safety, and did he not at the same time send a letter requesting assistance to save the cargo, and which he could not, and did not, attempt to do without such assistance?—*A.* It was the captain's particular duty, first, to save his passengers, and then objects of value; and then, if he could without assistance, save anything in his power. The captain did send a letter requesting assistance, and he did not save any other cargo till such assistance arrived.

Q. In preparing the règlement, were you not aware that the separate charge on the gold per *Dnieper* were exactly known and set forth, and that no other expenses were incurred for the salvage of the general cargo until after the gold had been safely landed at Gallipoli?—*A.* I did not know it; I only knew that the same day as the gold was saved assistance was requested from the Russian consul, and the *Defiance* was sent up to assist in salvage.

April 20, 23. *Watkin Williams* (with him *W. English Harrison*), for the plaintiffs. The first point which will be made by the defendants is, that as the nationality of the vessel was changed after the insurance was effected, this amounts to a deviation and alters the risk, and therefore invalidates the insurance. But this is altogether a fallacy. In the first place it is not every deviation from the voyage contemplated or intended by the shipper and shipowner, which is a deviation in the technical sense; for instance, in this very case, the intended voyage was from London to Constantinople, touching at Havre and Malta; but the insurance covers any ports in the Mediterranean, and therefore, had the vessel gone to Alexandria, a voyage involving much more risk, it would not have been a deviation within the terms of the policy. It is necessary, therefore, to look at the policy, to see if there is anything to prevent this vessel being changed from English to Russian ownership; now the vessel is not even described as English, but only by the name *Dutchman*, and the fact of the name being English does not amount to a warranty or representation that she is English: *Clapham* v. *Cologan.* (1)

[COCKBURN, C.J. There, the nationality of the ship remained the same. Lord Ellenborough says the underwriters might have inquired; if they had done so in the present case, they would have found the ship to be English, and then after they had entered into the insurance the nationality was changed.]

Even if it were a warranty that she was English at the time of the insurance, there would be no warranty that the same nation-

(1) 3 Camp. 382.

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ality should continue. In *Eden* v. *Parkison* (1), it was held that a warranty of neutrality only extended to the acts of the shipowner and not to external circumstances. So that when a Dutch ship was warranted neutral and continued Dutch, but during the insurance war was declared between England and Holland, it was held that the risk continued.

[*Sir G. Honyman, Q.C.*, contrà, referred to the note in 2 Arnould on Insurance, p. 572, ed. by Maclachlan, where the editor observes that *Eden* v. *Parkison* (1) is no longer law.]

The principle of the decision is not shaken, that a warranty of neutrality only extends to the acts of the insured, and not to external circumstances over which they had no control. So, although the change of nationality may have the effect, as in the present case, of greatly altering the consequences of a disaster caused by perils insured against, yet it does not really alter the risks, for on a ship becoming Russian she is not more likely than before to be wrecked; and supposing war risks not to be excluded by the policy, a change of the ship from a neutral to a belligerent nationality would not affect the policy (unless there were an express warranty) being within the risks insured against; and yet the change would greatly affect the probable results to the underwriters. It is quite out of the power of the plaintiffs, the shippers, to prevent the change of nationality; and, therefore no such implied warranty can be inferred on their part.

Secondly, what law is to govern the interpretation of this policy? No doubt the English law; and it will be said by the defendants that it is sought by the assured to interpret it by the law of a foreign country. But there is a distinction between the law which is to govern the interpretation of a contract, and the law which is to be applied in determining the loss, and the extent of it, under a given state of circumstances; those must be determined by the law of the country in which the disaster takes place, or at any rate, of the country of the port of destination, which in the present case are the same. This principle is clear, although, no doubt, difficulties have arisen, as will always be the case where a contract is made in one country with reference to things to be done in another. The amount of loss must, therefore, be ascertained by

(1) 2 Doug. 732.

the law administered in the Russian consular court, the nationality of the ship being Russian; for by capitulations between Turkey and the Great Powers, jurisdiction is in such cases transferred from the Turkish courts to the consular courts of the country to which the ship belongs. The jurisdiction, therefore, is clear; but it will be contended on the other side that the law administered in the court was not the Russian law.

[COCKBURN, C.J. The goods are pro tanto lost by perils insured against, that is, by perils of the sea, just as much as if, in consequence of the wreck, they had got into the hands of the people of an inhospitable country, who refused to give them up without payment of a large ransom. This, in effect, is what has happened. The goods came into Russian hands and became amenable to the Russian law, and certain sums are charged against them which would not have been charged by the law of some other countries.]

That is really the plaintiffs' proposition,—that the loss is by one of the perils insured against; but there are one or two cases which must be noticed and distinguished in order to sustain the proposition as put by the Lord Chief Justice.

[LUSH, J. The subject of the insurance, owing to the wreck, was absolutely in the power of the Russian officials,—withheld from the assured by vis major, and those officials claim a certain percentage according to what they say is the law. It is just as if the gold had, owing to the wreck, got into the hands of wreckers who claimed the sum as ransom; that would have been illegal; but if the assured could not get the gold back without the payment of the money, what does it signify whether the claim was according to law or not? It has been held that when a ship has been wrecked, and the cargo is carried off by wreckers, that is a loss by perils of the seas. (1)]

It is not necessary to go so far as that, as the policy covers loss by robberies; though, no doubt, it will be contended on the other side that this loss was not by robbery.

[LUSH, J. If, instead of the gold having got into the possession of the Russian officials, a suit only had been instituted in that court, the case would admit of a different consideration.]

No doubt: but here the plaintiffs were compelled to pay in

(1) See *Bondrett* v. *Hentigg* (Holt, N. P. 149).

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order to regain possession of the gold: and in this view, if the authorities had merely made the demand, without any formal judgment, that would have been a loss within the policy. It may be conceded, on the authority of *Don* v. *Lippmann* (1) and *Peninsular and Oriental Company* v. *Shand* (2), though contrary to the doctrine of Story's Conflict of Laws, s. 280, that this policy, although applying to a foreign voyage, being an English contract, must be interpreted, as to all matters contemplated in it, according to the English law. But conceding this, in the present case, the events which have happened must have been in the contemplation of the parties when they entered into the contract, namely, that the ship might become Russian, and, the policy covering all risks till the gold was delivered at Constantinople, that a disaster might occur in Turkish territory during the continuance of the policy, and that in that event the jurisdiction over average or salvage losses would be in the Russian consular court, where the mode of calculating the amount of contribution would be altogether different from the English. The parties, therefore, have contracted to pay on this contingency according to the Russian mode. It may be observed that the liability to the payment of general average, under an insurance of loss from perils of the seas, is on the ground that it is a constructive loss; and, as it would appear, though there is no English case on the subject, because, inasmuch as the loss is in respect of the goods, and arises from the perils of the seas, the insurer ought to bear the loss, and indemnify the insured: Pothier Traité du Contrat d'Assurance, § 52: Jet. Moreover, the law of general average is some hundreds of years older than the law of insurance: for it is mentioned by Grotius, and is supposed to be derived from the Rhodian law; whereas the origin of insurance is disputed between London and Antwerp. In the same way particular charges have been held to be within losses by perils of the seas: *Kidston* v. *Empire Insurance Company* (3), *Booth* v. *Gair* (4), and *Great Indian Peninsular Railway Company* v. *Saunders* (5), having decided that such charges could not be recovered

(1) 5 Cl. & F. 1.
(2) 3 Moo. P. C. (N.S.) 272.
(3) Law Rep. 2 C. P. 357.
(4) 15 C. B. (N.S.) 291; 33 L. J. (C.P.) 99.
(5) 1 B. & S. 41; 30 L. J. (Q.B.) 218; 2 B. & S. 266; 31 L. J. (Q.B.) 206.

under the suing and labouring clause, because not incurred to avert a peril insured against. *Mumford* v. *Commercial Insurance Company* (1) is to the same effect. That the loss sustained in this particular case was covered by the policy is shewn by the consideration, that the assured himself is bound to make this contribution according to the law of the place where the misfortune happens; and the obligation is founded, not on any contract by bill of lading, or otherwise, but on the general maritime law, by reason of the community of danger in which the ship and all in it are placed: *Simonds* v. *White.* (2) The obligation which the assured comes under is the law of the place; he has no choice in the matter, for the obligation is imposed upon him by vis major. This is a contingency contemplated by the parties, and the underwriters have no more right to complain of the law of the particular place than they have of the weather. Next, was the decision of the court according to law, so as to bind the underwriters? It is difficult, if not impossible, to understand the details, owing to their minuteness; but all the witnesses were agreed that the law administered in the Russian consular court is identical with the French law; and it is conceded on all hands that where a wreck occurs in Turkish territory, the jurisdiction to inquire into and settle all claims arising therefrom is in the consular court of the country to which the ship belongs; consequently, in the present case, the Russian court had jurisdiction. The court having thus jurisdiction, the judgment appears to have been that it was not a case of general average, but of salvage, inasmuch as the ship was ultimately lost. The judgment then proceeds to adjust the salvage in a way, no doubt, very different from the English system; but there are two cases which go to shew that the underwriters are bound by such an adjustment, although contrary to the English principle. *Walpole* v. *Ewer* (3) shews that the law of the place of adjustment must govern the mode of adjustment. There the holder of a respondentia bond, having been adjudged liable to contribute according to the law of Denmark, was held entitled to recover the loss against the underwriters, although this particular average is unknown to the law of England. In *Newman* v. *Cazalet* (4) it was shewn that

(1) 5 Johnson, U. S. R., 262.
(2) 2 B. & C. 805.
(3) Park Ins. 898, 8th ed.
(4) Park Ins. 900, 8th ed.

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the usage in London was to pay according to the foreign statement; so that the case goes no further than that when such a usage is established, the foreign statement binds the underwriters. In *Power* v. *Whitmore* (1), which may be cited contrà, there was no evidence of custom, nor was there any evidence of what was the law of the country (Portugal) in which the judgment was obtained, and the Court of Queen's Bench refused to give effect to the judgment, as it appears, on the ground of this want of evidence. If that is the ground of the decision, the case is at once distinguishable from the present: for here there is a mass of evidence to shew that the judgment was according to the law administered in the Russian consular court. There are two American cases, *Loring* v. *Neptune Insurance Company* (2) and *Strong* v. *New York Firemen Insurance Company* (3), which are conclusive, that where the loss is shewn to have been adjusted at the port of destination according to the law of the country, the adjustment is binding on the underwriters, although the contributory interests have been estimated on principles at variance with the law of the country where the insurance was effected. The latter case also proceeded on the express ground, applicable to the present case, that there was no possibility of the owners of the goods regaining them except by paying the money awarded against them. In Phillips' edition of Stevens and Benecke all the cases are gone through and commented upon, and at p. 271 the "question of great importance" is considered "whether underwriters are liable for claims of general average as adjusted in a foreign country, and according to the laws of that country, or whether they are liable only for losses of that nature as adjusted according to the laws and usages of their own country?" and Mr. Phillips, at p. 279, thus sums up the conclusion at which he arrives: "The contract of insurance, like every other, is expounded according to the laws of the place at which it is made. But as far as the stipulations of the contract come under the jurisdiction of the laws and tribunals of foreign countries, and are adjudicated upon or settled according to the laws of such countries, the parties ought to be bound. This is the general doctrine in such cases, and it is particularly laid down by Lord Ellenborough, in the case of

(1) 4 M. & S. 141. (2) 20 Pick. Mass. R. 411.
(3) 11 Johnson, U. S. R., 323.

Power v. *Whitmore* (1), cited above in the text, in respect to an average contribution. Most of the cases, though not all, in which the claim arising on a foreign adjustment has been rejected, are cases in which the loss contributed for in the foreign adjustment was not insured against in the policy, according to the construction put upon it in the place where it was made; or it did not appear that the foreign adjustment was made according to the laws of the foreign port; or it did appear that, in respect to the claim in question, and the subject insured in the policy on which the claim was made, the assured had not been compelled to settle, and had not actually contributed abroad, on the basis of the foreign adjustment."

For these reasons it is submitted that the plaintiffs have been compelled by a competent authority abroad to contribute this sum in order to obtain repossession of the gold, under circumstances which, upon the proper construction of the policy, were in contemplation of both parties as a risk and peril within the operation of which the gold was liable to come; and therefore, upon the construction of this policy according to English law, the underwriters are bound to reimburse the plaintiffs, in order to give them that indemnity which they bargained to receive at the hands of the defendant's company from the perils insured against.

Sir G. Honyman, Q.C. (*Mellish, Q.C.*, and *Lodge*, with him), for the defendant. The underwriters are not liable. The defendant does not dispute the liability to the charges on the gold itself, as to which money has been paid into court; but it is sought to make the gold liable to pay, in proportion of nearly five-sixths of the cargo, towards the expenses incurred in saving part of the ship and the rest of the cargo. For this the gold is not liable; it was landed days before any of this expense had been incurred, or any proceedings taken for the purpose. In the first place it is to be observed that Mr. Lamb tells the authorities that he had landed the gold, whereas it had been landed by the captain.

[COCKBURN, C.J. Surely this is immaterial; the captain and Mr. Lamb represent the same interests, and the gold, having got into possession of the Russian authorities, could never have been released without the deposit and subsequent payment of expenses charged upon it.]

(1) 4 M. & S. 141.

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Mr. Lamb, at all events, was materially interested in getting the gold to contribute; and the claim is apparently made out by adopting the Russian scale of charges, and enforcing that by the French law, and then it is sought to charge this against the underwriters in a policy effected in England on an English ship; and it is admitted that if the ship had remained English the greater part of these charges would not have been made, not being chargeable according to English law, nor, indeed, according to the general maritime law. "The principle of general average, namely, that all whose property has been saved by the sacrifice of the property of another, shall contribute to make good his loss, is of very ancient date, and of universal reception amongst commercial nations. The obligagation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law:" per Lord Tenterden, C.J., in *Simonds* v. *White*. (1) And on this it is said in 2 Arnould on Insurance, 3rd ed. p. 799:—"Goods landed or sold for the necessities of the ship before a jettison, do therefore not contribute, because they were not exposed at the time of the jettison to a community of risk, and were not saved thereby."

[COCKBURN, C.J. This is not a case of jettison; but both the French and Russian codes say that in case of jettison the captain shall exercise his discretion and throw over the least valuable goods first. This is the converse of that; but the same principle may well apply that the saving of the least valuable should be postponed to the more valuable; and it seems but reasonable that the owner of the least valuable, whose goods are not saved, should be able to claim contribution from the owner of the goods that are saved.]

Emerigon on Insurance, ch. 12, ss. 41, 42, seems to lay down the law directly contrary to the principle enunciated in this judgment. It is said, s. 41 (p. 473 of Meredith's translation):—"Enumeration of General and Particular Averages." "Damages happening to the merchandize through shipwreck are particular averages for account of the owners. The owner of the shipwrecked vessel, and the owners of goods lost in the shipwreck, cannot claim contribution from those who have had the good fortune to save

(1) 2 B. & C. at p. 811.

their effects; because the loss that both has suffered has not procured the common safety: Amissæ navis damnum, collationis consortio non sarcitur per eos, qui merces suas naufragio liberaverunt; nam hujus æquitatem tunc admitti placuit, cum jactûs remedio, cæteris in communi periculo, salvâ navi consultum est. It is the same with this case as with a fire; he who saves his own saves it for himself: Cum depressa navis, aut dejecta esset, quod quisque ex eâ suum servasset, sibi servare respondit, tanquam ex incendio. 'After the shipwreck,' says Cleirac, 'there is no contribution to be made between the merchandize recovered and fished out of the water, and that lost; but sauve qui peut.' 'Chi salva,' says Casaregis, 'salva; chi perde, perde.' The doctors treat the question whether in such a case I ought to save the thing deposited with me rather than my own. It seems that it is not blameable to think first of oneself; prima charitas sibi. There is nothing to prevent an agreement in the beginning, that in case of shipwreck all that is saved shall be common to the vessel and cargo. It is the case of germinamento, mentioned supra." The universal law, therefore, is, that you can only be called upon to contribute to those expenses from which you derive benefit.

[COCKBURN, C.J. It might well be argued that the saving of the gold was an independent matter, and the gold had nothing in the world to do with the subsequent operations; but here a judgment of a competent court has condemned the gold to pay a certain amount, and the owner has no alternative but to pay in order to get his gold back. Is not that a loss by reason of the wreck of the ship?

LUSH, J. If this were an action for contribution, all the authorities may be conceded to be on the side of the defendant.]

Are the underwriters then liable, under an English policy, for something which is not general average according to the law of England, because it is determined to be general average by a court of the country to which the ship is going? This question naturally subdivides itself into two questions, whether they are liable by the mere decision of the court, or whether only if the court has decided according to law. In the first place, it is common practice to insert in policies a clause that the underwriters undertake "to pay general average according to foreign statement" which is

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consistent with the case of *Newman* v. *Cazalet* (1); and this tends to shew that, without such a clause, the underwriters cannot be liable for any general average but what is so by the English law; and *Power* v. *Whitmore* (2), shews that the decision of the foreign court is not sufficient without evidence that on the facts there was general average according to the law of the country.

[HAYES, J. What in foreign law is a question of fact must be proved like all other facts.]

Mr. Phillips' edition of Stevens and Benecke on Average has been cited by the other side; there are, however, passages in it strongly in favour of the defendant; thus at pp. 272—3: "On the other hand it cannot be denied that in many places statements of general average are made, not only by individuals, but even by persons authorized for that purpose, and by tribunals of commerce, which are in direct opposition not only to the general principles, but even the very laws of the country where they are made; and the parties too easily acquiesce in such adjustments when the loss arising from them falls not upon themselves but upon their underwriters. The proper way, therefore, to do justice to all parties, seems to be to admit such foreign statements of general average only to which the assured was obliged to submit, and which are made according to the well-known laws and established usages of the place of discharge; and if any mistake has occurred to the injury of the assured, which he might and ought to have opposed, to correct the statement according to the law of the place of discharge. All adjustments of general average made at an intermediate place will thus be entirely excluded." This is entirely in accordance with *Power* v. *Whitmore*. (2) The summing up of Mr. Phillips at p. 279, cited by the other side, amounts to no more than what the defendant contends for, that to bind the underwriters it must be shewn that the judgment is itself in accordance with the law of the country. *Power* v. *Whitmore* was recognized by Lord Tenterden in *Simonds* v. *White*. (3) Phillips on Insurance, §§ 1414, 1415, and 2 Parsons on Marine Insurance, pp. 360—366, are to the same effect, that the underwriters are only liable to reimburse for general average shewn to be in conformity to the law of the place to which

(1) Park Ins. 900, 8th ed. (2) 4 M. & S. 141.
(3) 2 B. & C. at p. 810.

the jurisdiction of the adjustment belongs. In 2 Arnould on Insurance, p. 821, 3rd ed., it is laid down as law that the underwriters are only liable for general average by foreign adjustment when it is shewn to have been rightly made according to the law and usages of the particular country. The onus, therefore, is on the plaintiffs to shew that this adjustment was according to the law administered in the Russian consular court. Now the evidence of the experts is contradictory as to what law or principle was or ought to have been applied in the judgment. [He then went through the evidence of Routh, Jourdan, Sivori, Pellegrini, and Paulaky.] Sivori relies on Articles 350, 369, and 381 of the French Code de Commerce Maritime, as well as Article 385 mentioned in the judgment; but there is nothing in any of those articles applicable to such a case. Nor do the authorities vouched by the witnesses bear them out.

[COCKBURN, C.J. Article 812 of the Russian code seems nearly identical with Article 411 of the French code, as to jettison; that the things of most weight and least value are to be thrown over first (1); but there appears to be nothing in either code applicable to this particular case; it seems, however, that the persons who drew up this judgment treat it as a case of salvage, not of general average; and when the witnesses say that the French and Russian codes agree, they mean as to the way in which property shall be sacrificed, the least valuable in prefcrence to the more valuable. I have been informed, however, by competent authority, that the Russian code is amended and supplemented from time to time. The law may, therefore, have been altered within the last few years. (2)]

But there is no authority for the experts' doctrine of this kind of "necessary or natural general partnership," which is certainly repudiated by Emerigon.

[COCKBURN, C.J. I certainly can find no authority for that.]

The cases already cited shew that what the foreign law is must be clearly proved; in addition to which may be cited *Trimbey* v. *Vignier*. (3)

(1) See 2 L. Levi's Commercial Law, pp. 149, 151, 154.

(2) The Chief Justice was using Leoni Levi's Commercial Law, published in 1852; and Sir G. Honyman was citing from Saint Joseph's Concordance entre les codes de commerce étrangers et le code de commerce Français, of about the same date.

(3) 1 Bing. N. C. 151.

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[COCKBURN, C.J. The question is not so much whether the decision was right, as whether the assured had any other means of getting this gold except by paying the sum adjudged against it.]

The plaintiffs might have appealed to the court of St. Petersburg.

[LUSH, J. Suppose they had appealed, and spent double the amount already expended fruitlessly, would the underwriters have been liable for this?]

Yes, under the suing and labouring clause. Lastly, there remains the question of the effect of the change of flag. It cannot be contended, perhaps, that the change avoided the policy, as there was no warranty against the change, and such a warranty could not, probably, be implied; but there was an implied agreement that the underwriters should not be called upon to pay more than they would have been had the nationality of the ship continued what it was at the time of effecting the policy. In 1 Arnould on Insurance, p. 331, 3rd ed., it is said, "Any unnecessary or unsanctioned change of the ship produces an alteration of the risk underwritten, and therefore exempts the insurers from liability." *Clapham* v. *Cologan* (1), is no authority against the defendant, as has already been pointed out by the Lord Chief Justice. If the underwriters had made inquiries in the present case, as it was suggested by Lord Ellenborough in that case that they ought to have done, they would have been informed that the ship was English belonging to the port of Waterford. The fact that the change was effected without the plaintiffs' knowledge cannot affect the question; if they have suffered from it, they have their remedy against the shipowner. It is said that this was a loss by the perils of the sea; at the most, it was caused by perils of the sea plus the change of ownership, and if the ship had continued English no such loss as that sought to be recovered would have happened.

[MELLOR, J. The defendant's company knew that the ship was bound to Constantinople, and they contemplated, you say, the fact, that, as the ship was English, any loss occurring would be distributed by the English court according to the principles of the English law?]

(1) 3 Camp. 382.

Yes; the contract is an insurance on goods in an English ship going to Constantinople, which would therefore by the conventions be subject to English law at the port of destination, and what the underwriters undertook to do by this insurance must be determined by the state of things at the time the contract was entered into.

[LUSH, J. I am not aware of any authority for such a proposition, which amounts to saying there is an implied warranty against change of nationality in the ship.]

There is a further objection, that these persons were appointed to settle general average, and they proceed to settle a salvage claim; they were therefore acting without authority. Lastly, the damage was too remote: *De Roux* v. *Salvador*. (1)

[LUSH, J. There the amount, which the plaintiff's vessel had to pay towards the damage done to another vessel owing to a collision, was held too remote a damage. Here, in consequence of the wreck, the gold got into the hands of the Russian authorities, and was lost to the assured unless they paid the amount awarded in order to recover it. It is precisely the case I have already put of wreckers.]

W. Williams, in reply. It is said, that it was in contemplation of the parties, at the time the policy was entered into, that the average to be paid should be according to English law. But there is not the slightest reference in the contract to the ship being English. With reference to the plaintiffs not having appealed, if they had unsuccessfully appealed it is clear that, on the defendant's contention, the plaintiffs could not have recovered the costs under the suing and labouring clause, as that clause only applies when the expenses are incurred in endeavouring to avert a loss by a peril insured against; but the defendant says this was not such a loss. It is clear, as reasonable uninsured owners, the plaintiffs would not have run the chance of incurring further costs; and, moreover, Mr. Lodge, who was acting as agent for the underwriters, was on the spot, and never suggested the propriety of appealing. Lastly, the argument, sought to be raised from the frequency of clauses as to paying average according to foreign statement, falls to the ground; the plaintiffs are not seeking to be reimbursed general average

(1) 4 Ad. & E. 420.

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according to foreign statement, but according to a judicial decision of a competent court.

COCKBURN, C.J. I am of opinion that our judgment should be for the plaintiffs. The case has been extremely well argued on both sides; and I do not think that we should gain anything by taking time to consider the matter; as the principles on which we ought to decide are, to my mind, quite clear, and the facts are now sufficiently ascertained.

The plaintiffs insured a quantity of gold to be conveyed to Constantinople by the ship called the *Dutchman*, and they have, in consequence of that ship having been wrecked, and the gold having thus got into the hands of the Russian authorities, been compelled to pay a large percentage in order to get it back.

The argument in favour of the defendants was based on several distinct grounds. It is said in the first place that the insurance upon the gold was effected at a time when this vessel was an English ship, and that after the insurance was effected her nationality was changed; she was sold to Russian owners, and became a Russian ship; the consequence of which was that when she was wrecked within the Turkish territory, she and her cargo came under the jurisdiction of the Russian consulate at Constantinople, by virtue of the existing treaties between Russia and Turkey. Upon turning to the policy of insurance we find that it is an insurance generally upon the gold to be conveyed to Constantinople by this particular ship; but there is no assertion that the vessel is an English vessel, nor any stipulation that she shall be or continue to be such. Now there being no such express condition, it seems to me that we are not called upon to imply one. The change of the nationality of the vessel was not a matter within the control of the plaintiffs, neither was it their act. It was a thing which might take place without any intervention on the part of either the assured or the insurer. It must be taken to be one of those things which, unless there is an express stipulation with respect to them, are things possible and incidental in the case of such a policy, and we are not called upon therefore to imply such a condition.

Then we come to the second branch of the argument for the de-

fendants, and here I agree with the learned counsel for the defendants, that we must construe this policy as it would be interpreted by the law of England; but then, by the policy as interpreted by the law of England, the insurer is liable to pay in respect of any loss occasioned by any of the perils insured against; and we come to the question, which is the question in the case, whether the loss upon this gold, by reason of the percentage which the owners of the gold had paid, is a loss by any of the perils insured against.

4 P.C. 159.

The facts lie in a very narrow compass. The ship, having become a Russian ship, is wrecked in Turkish waters; the gold, the subject matter of this insurance, is saved by being immediately sent on shore, the captain taking advantage of having to send his boat, and thinking it best to save this portion of the cargo, which, of course, was by far the most valuable part, and, from its small bulk, the part most easily saved. He deposits it or causes it to be placed in the hands of the Russian consul. It is unnecessary to follow these proceedings in any detail through their course: but afterwards a claim is made in respect of the expenses, which were incurred in endeavours to save the ship and the rest of the cargo, on the gold in the consul's hands; and in the end, the matter having been investigated by persons appointed by the Russian consul, judgment is given as to the amount which shall be contributed by the owners of the gold to satisfy the claim for contribution in respect of the expenses. That judgment is ratified, as it was necessary that it should be, by the Russian minister at Constantinople, and being so ratified, and not being appealed against within a certain time, the judgment became a binding judgment upon the parties concerned. That being so, the owners of the gold being shewn to have no alternative in order to get the gold but to submit to the payment of this percentage, and in the meanwhile they, or some one, having given security, in the end they were obliged to pay the money themselves.

Now, it has been contended on the part of the defendants that the proceedings of the tribunal by which this judgment was given were wrongful in many respects. In the first place, that having to apply the Russian commercial code they applied the French. I think there is quite a sufficient answer to that. It appears that in matters relating to maritime law in which the jurisdiction of the

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Russian consulate has to be exercised, they have not at Constantinople the presence and assistance of Russian advocates to explain the law, whereas there are French advocates resident there, and the laws of the two countries being with reference to these matters almost the same, they had recourse to the French law, and applied it in this instance. Whether that is strictly right or wrong I do not take upon myself to pronounce, for I think it is a matter with which we have nothing to do; but if in this case they applied the French law as a substitute for the Russian, I think we must take it that they did it with proper authority.

Then it is said that they applied the law erroneously. Again, I think we have not to deal with that. We are not to sit here as a court of appeal against any judgment pronounced by a court which must be taken to be one of competent jurisdiction in the administration of Russian law, and whatever was substituted became for the time Russian law in respect of matters of maritime law. The proper tribunal to appeal to, if there was any ground for appeal, was to the court of St. Petersburg. There is no appeal here, and the only question, as it seems to me, that we have to consider is whether the assured, in order to get back the subject matter of the insurance—the gold—could do otherwise than they have done. Then it is said they ought to have appealed to St. Petersburg. I agree that when we are considering the question of whether there has been a loss of the subject matter of the insurance, so as to call upon the underwriter to make it good, if there is anything to prevent the subject matter of the insurance being totally lost, which the assured, if he was uninsured, would as a reasonable man have felt himself called upon to do, it might very well be said that the subject matter of the insurance has not been lost, so long as that which a reasonable man ought to have done has not been done; but as I can see no reason for supposing that the tribunal at Constantinople administered any other law than that which they were entitled to administer; and as I cannot see under the circumstances that a sufficient case has been made out to show that they did erroneously apply the law either in respect of the law or the facts, I cannot come to the conclusion that the assured ought reasonably, instead of submitting to the loss in the first instance, to have run the risk of losing that which would have been undoubtedly a con-

siderable addition to the expenses already incurred by appealing to St. Petersburg, where, very possibly, the judgment of the court would have been upheld.

Then we come to what seems to be the essence of this question, as it was impossible to get the gold, except by submitting to the judgment, unless the plaintiffs succeeded in reversing it, which I do not think as reasonable persons they were called upon to attempt, is that a loss by one of the perils insured against? By reason of the wreck the gold is shifted from the ship and transferred, not to Constantinople, the place of its destination where it was to be delivered to the consignees, but into the hands of the Russian authorities; they refuse to part with it, and it becomes the subject matter of litigation in which there is a judgment, and by virtue of that judgment those who have possession of the gold are not bound to give it up, unless the owners pay certain expenses. The owners cannot get it but by that payment. The necessity for that payment arises out of the fact that the gold had got into hands from which it could not be recovered, except by conforming to the judgment of the tribunal that a certain sum should be paid. It seems to me, therefore, that the loss was an immediate, necessary, and by no means too remote consequence of the wreck, and therefore the consequence of one of the perils insured against; and consequently the underwriters are bound to indemnify the owners for it.

It seems to me that the whole case lies in this narrow compass, that there has been a loss, an undoubted loss, a loss which the assured could not by reasonable means prevent, and that that loss flowed immediately from the wreck, the wreck being occasioned by the perils of the seas which were insured against by the underwriters.

MELLOR, J. I am of the same opinion. As to the first point to which the Lord Chief Justice has referred, that by a change of ownership and change of nationality there was an increase of risk which therefore rendered the policy invalid, the argument for the defendants must go the length of saying, that although there is no express stipulation to be found in the policy, there are expressions in it which amount to an express stipulation, or else that we must

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say there is an implied condition between the parties that no change of ownership should occur, so as to affect the nature of the risk, as it is contended it would be affected by the change of ownership in the present case. Now, I think as a general rule, one ought never to imply a contract in a case where the party against whom the contract is to be implied had no control over the subject matter, and could not by any power of his own secure the performance of any such contract to be implied against him. Therefore, it is always necessary, in judging of whether a contract ought to be implied, to keep in mind what is the power and position of the parties.

But what is the change and increase of risk which it is contended took place? The ship is the same, the voyage is the same, the captain and the crew are the same, and the only difficulty which may arise is, that the underwriters in one case would come under the jurisdiction of the English consular court, which was established by virtue of the capitulations, instead of coming under the Russian consular court. Every one admits that, the ship having met with an accident by perils of the seas, you must see what her nationality is, with a view to ascertain the jurisdiction which is to determine the liability of the underwriters and the extent of it. But it seems to me that no such thing entered into the contemplation of either party as this question of nationality, and in truth they either did not attach importance to it, or it did not occur to them. For the future, if the matter is of sufficient importance, it will be quite necessary and proper to introduce into these policies stipulations which will limit the insurance, so that the nationality of the ship shall be the same throughout the voyage. By the accident of the shipwreck happening within Turkish waters, the ship came under the jurisdiction of the Russian tribunal, having changed its nationality and become a Russian ship. And, so far as the proceedings are concerned, the only fault to be found with them is that, as the defendants say, the Russian court at Constantinople did not, in a regular and proper way, administer the law so as to render the parties liable to its jurisdiction; in fact, that it was an erroneous judgment; that the facts were misunderstood, or the law was misapplied, or the law applied was not the law which, according to the consular court, ought to have been

applied. But ex concessis the court had jurisdiction, and if there was any such ground of objection, there was ground of appeal; and with reference to that the only question is, would a party uninsured have brought this appeal to the court at St. Petersburg? Now, in the course of the litigation, the underwriters had the fullest knowledge of what was going on; they were fully aware of the course of proceedings from first to last; and there was no suggestion ever made by the underwriters, or the persons representing them, that it would be a prudent or proper course to appeal to the court at St. Petersburg. I think that is the strongest possible evidence to show that an uninsured owner would not have instituted such an appeal. If there were any good ground for appeal, the suggestion would have come from those who represented the underwriters. It did not, and therefore I think the appeal must be put out of the question. That being so, I agree with the Lord Chief Justice that, as the judgment was the judgment of a competent court having jurisdiction over the matter in dispute, and it was not appealed against, the plaintiffs could not get back this gold without paying the sum adjudged against them. No doubt it does appear a very extraordinary and very large exaction; but, without paying that, the assured could not possibly get the gold. Then what were they to do in the interest of all parties? Surely, if it was not a prudent thing to appeal, there was no other mode of getting the gold but by paying that exaction. I do not see myself in what other way the plaintiffs could have proceeded. Therefore, I think the judgment of the Court should be for the plaintiffs for the amount claimed.

LUSH, J. I am of the same opinion. As to the first question, I am not aware that it has ever been raised before, and, as far as I know, nothing has been said in the books on the subject. I think that affords a very strong argument against the validity of the first point urged as a ground of defence to this action,—viz., that the vessel, being English at the time the policy was effected, was passed over after that time into the hands of Russian subjects, and so became a Russian vessel. As the vessel was bound to Constantinople, I think, looking at the peculiar jurisdiction which prevailed there, it is clear that, by reason of her having changed

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her nationality, the insurers, the underwriters, although their risk was not increased by that circumstance, did come under a heavier liability in the events that happened than would have been the case if the nationality had remained as it was at the time the policy was effected. But that circumstance cannot affect the assured, unless there is a warranty expressed or implied in this policy that the nationality of the ship should not be changed. Nothing is expressed in the policy itself about the nationality of the vessel. There is no express stipulation that the vessel shall not change hands, or change her national character. The shipper has no power over the vessel, and has no power to prevent the owner selling her; and it would therefore be absurd for us to hold that a shipper of goods enters into an implied contract that the owner of the ship shall not during the voyage change the nationality of the ship. I think it would be against common reason for us to hold that any such understanding could be in the minds of the assured or the underwriters; and as there is an entire absence of authority to support any such contention, I think, without any doubt, that that ground of defence must altogether fail.

The next question is whether the amount claimed can be properly said to be a loss occasioned by one of the perils insured against, namely, by perils of the sea. It has been argued that this is an analagous case to a loss under general average. Cases have been cited on that subject which at first sight appear to give countenance to the argument raised on them; but I cannot help observing at the outset that this is not a case of average contribution at all. No goods were put overboard here to save the vessel, no part of the vessel was voluntarily sacrificed in order to save the cargo, but the vessel had become a wreck before any of the events happened out of which the litigation arises. This is really a case of salvage; not of average loss. But upon one case, *Power* v. *Whitmore* (1), which has been cited by Mr. Williams, and afterwards by Sir George Honyman, I think it necessary to make a few observations, in order to distinguish anything to be found in that case from this. That was a case in which the underwriters were sued for the contribution which the shipper was obliged to pay, pursuant to a decree of the court of Lisbon, in a suit instituted

(1) 4 M. & S. 141.

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by the master. The vessel was on a voyage from London to Lisbon, and got into difficulties on its way, and the master put into Cowes, and there incurred considerable expense, being chiefly the wages of the crew during her stay there, and the cost of provisions consumed during that time. Those are items which would not be allowed by an average-stater in this country, and when the master got to Lisbon he libelled the different owners for contribution towards what he alleged to be the general loss, and the court of Lisbon decreed against the owner of the cargo for his contribution. The owner sued the underwriters for the amount he had paid, and the question was whether that was a loss by the perils of the seas. It is perfectly clear, according to the English law, that it could not be subject matter of general average at all, and there was no proof that by the law of Portugal those items would be allowed under general average. There was nothing more given in evidence than the judgment, and the case was therefore disposed of on that ground. It was not a case of average according to the principles of the law of England; and there was no proof of its being so by the law of the particular country, Portugal; and that being so, it was not shewn to be a loss within the policy at all. The parties there were not in the position in which the parties are here; there was no one in possession of the goods as salvors, but the claim arose out of the judgment of the court of Portugal against the owner of the goods in favour of the captain, who sought to enforce an average contribution.

I cannot distinguish the present case in principle from that of *Bondrett* v. *Hentigg* (1), to which I have more than once alluded in the course of the argument. The facts here are that the vessel having got within the dominions of the Turkish empire, being according to the evidence a Russian vessel, the Russian authorities at Constantinople had immediate jurisdiction over the whole wreck, both the vessel and cargo. The statement of one of the witnesses (Jourdan), which we must take, I think, for the present purpose to be a correct statement of the law prevailing there, is that "in case of wreck occasioning a case of salvage, the Russian chancellerie appoints a curator, whose duty is to superintend the salvage operations, and to pay all the expenses incurred; to sell the goods,

(1) Holt, N. P. 149.

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if necessary; or to deliver to the consignees their goods, if the consignees will accept them, on their undertaking to pay the contribution to the expenses which shall be fixed by the règlement against the merchandise." So that as soon as the vessel became a wreck, the Russian authorities acquired jurisdiction over the matter. They had the power to take possession of the goods, and to hold them until an undertaking was given for payment of the salvage expenses, which were afterwards decreed against the owners. I cannot distinguish that in principle from *Bondrett* v. *Hentigg.* (1) There the vessel had become wrecked near the Isle of France, and some of the cargo was saved and got on shore, and then the inhabitants of the island came down and overpowered the crew, and took possession of part of the goods which had been so saved from the wreck; and upon these facts Gibbs, C.J., says: "The cause of the loss was the perils of the seas, and the portion of the goods which was saved from the wreck though got on shore never came again into the hands of the owners. It is therefore a total loss to them from the perils stated in the declaration." That case was observed on and approved by my Brother Willes in the case of *Ionides* v. *Universal Marine Insurance Company* (2) in which he gives several illustrations of circumstances which would constitute a total loss; and he says: "The authorities appear to furnish an intelligible rule, viz., that where there is a wreck of a vessel without hope of recovery, the cargo may be treated as also lost, if the circumstances are such that no part of it can be recovered for the benefit of the party insured."

Now here, the vessel having become a total wreck, the Russian authorities, having acquired jurisdiction, took possession of that wreck, and demanded salvage charges for having done what they did. They got possession of this gold, and they appointed a curator; they did not get possession of it by actually taking it out of the wreck, because the master, in order to save the most precious part of the cargo when he saw the extreme danger of the vessel, sent it on shore for safe custody, and put it into the hands of the Russian consul there, and so it got into the very hands which afterwards would have taken it out, if it had been left on board

(1) Holt, N. P. 149.

(2) 14 C. B. (N.S.) at p. 292; 32 L. J. (C.P.) at p. 177.

the ship; and the Russian authorities had as much control over it as if the Russian curator had taken it himself out of the vessel. The curator was appointed, and so much of the cargo as could be saved was got out of the vessel, and the whole of it was in the hands of the Russian authorities, and they had physical power at all events to withhold it from the owners until the owners chose to pay what the authorities considered right to charge for salvage; and rightly or wrongly the statement was made out, the aid of the consulate court was invoked, and in the result it was determined that the owners of the gold should contribute their proportionate part of the salvage, though according to the English law they would not have been under any such obligation. The Russian authorities had the entire power in their hands to withhold the gold and to exact any terms they thought proper, and it was therefore under that influence—that vis major—that the money was paid; it was money necessarily paid by the owners of the gold, as they could not get it till they did pay. They paid therefore under that compulsion in order to get possession of the goods which were primâ facie lost, or would have been lost if they had not the means of getting them back again. Therefore I think that this was a loss by the perils of the seas, and a salvage loss within the terms of the policy.

The only remaining question is, whether the plaintiffs ought as reasonable persons to have applied to the superior court to endeavour to reverse the judgment against them, because if they ought, and had a reasonable ground for supposing that they could reverse it, it is said they paid the money in their own default. But looking at the facts I do not think that, acting as reasonable and prudent men would, they would have taken upon themselves that expense. There is nothing in this case to show that the law administered by the court at Constantinople was not the law prevailing there, or the usage of the place, nor that there was any hope of getting that decision reversed by appealing to the court of St. Petersburg. But the argument is stronger against the underwriters, for although they were represented by a person on the spot, he never suggested that the plaintiffs should endeavour to reverse the judgment.

I come therefore to the conclusion that this money was neces-

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sarily paid by the owners of the goods insured for rescuing their property from what otherwise would have been a total loss, and therefore the plaintiffs are entitled to recover it against the underwriters.

HAYES, J. The only authority that has been relied on as directly bearing on the particular question in this case is *Power* v. *Whitmore*. (1) I agree with what has been said by Mr. Williams, that it is not so easy,—I will not say to understand that case, but,—to distinguish this case from it. The ground of the decision appears to be, that there must not only be the decision of a court of competent jurisdiction in the place where the facts of the loss and the amount are ascertained, but that it must be shewn that the law is in accordance with that which has been pronounced by a competent authority to be the law of the country. That seems to be rather an infringement of general principles; because one would think that the exposition of a court is about the best evidence you can have of the law of a country. But that case would account for a good deal that is said on the subject, where you have to deal with an average statement which is made in a foreign country by a foreign average-stater, not a lawyer, that, in order to support that statement, it should be accompanied by evidence of what the law really is; and that seems perfectly reasonable, and is supported by many of the extracts from the American books. However, there is a distinction here; even if it were necessary to shew what the law of the country is, there is abundant evidence in the depositions, independently of the judgment, to shew that the law applicable to the case, and which was administered by the Russian consul, was the French code. We have it stated in express terms in the judgment, and there is also the evidence of Sivori, who seems to be a competent witness, and has practised for a considerable period of time, that the judgment of this court is, in truth, in accordance with the law which is administered by the Russian consul. Therefore, putting those two facts together, they entirely supply the want which was said to exist in the case of *Power* v. *Whitmore* (1), namely, that, although there was a judgment by a competent authority, yet there was no evidence of what the law was. Here

(1) 4 M. & S. 141.

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I think there is a clear distinction, which, at all events, does distinguish the case from *Power* v. *Whitmore* (1), and on the express ground mentioned by the learned Chief Justice who gave judgment in that case.

Judgment for the plaintiffs. (2)

Attorneys for plaintiffs: *Oliverson, Peachey, Denby, & Peachey.*
Attorneys for defendant: *Waltons, Bubb, & Walton.*

PRIDEAUX, P. O., *v.* CRIDDLE.

May 11.

Bill of Exchange—Cheque—Presentment—Notice of Dishonour.

A. drew a cheque on H. & Co., bankers at Falmouth, in favour of the defendant on the 4th of June, and the defendant paid it into the bank of the plaintiffs (his bankers) at Truro on the 5th. On the same day the plaintiffs sent the cheque to B. & Co., their agents in London, who received it on the 6th, and on the same day presented it, through the country clearing house, to H. & Co.'s agents in London. On the same day H. & Co.'s agents forwarded the cheque to H. & Co. at Falmouth, who received it on the 7th. On that day H. & Co.'s agents in London failed. On the 7th B. & Co. wrote to H. & Co. to return the cheque or to pay it. On the 8th H. & Co. wrote, declining to do either, and stopped payment on the following day. The plaintiffs gave the defendant notice of dishonour on the 9th:—

Held, that if the plaintiffs had sent the cheque to an agent at Falmouth, that agent would have been entitled to another day to present the cheque for payment; sending the cheque to London through the clearing house did not take any longer time; and that there had been no delay in the presentment of the cheque. That, as the notice of dishonour was given on the day following that on which the cheque was dishonoured, it was given in due time. And the plaintiffs (who had entered the amount to the defendant's credit) were, therefore, entitled to debit the defendant with the amount of the cheque on its not being paid.

THIS was an action brought by the plaintiff as public officer of the Devon and Cornwall Banking Company, to recover from the defendant the sum of 106*l.* 4*s.*

The declaration contained counts for money lent, money paid, interest, and money found to be due upon accounts stated. The defendant pleaded never indebted; payment; and set-off, for money

(1) 4 M. & S. 141.

(2) There was some discussion as to interest; and the Court directed that the judgment should be for the amount claimed, with interest at 5 per cent., on the whole, from the date of the confirmance of the statement by the judgment of the consular court, down to the time of the payment into court, and on the residue up to the date of the present judgment.

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had and received, money lent, money paid, and money found to be due upon accounts stated.

By consent of the parties the following case was stated for the opinion of the Court:—

1. The Devon and Cornwall Banking Company, hereinafter called the plaintiffs, carry on the business of bankers in Cornwall, and have branch establishments at several different places, and amongst others at Truro, in Cornwall.

2. The defendant, for some time previous to the month of June, 1866, and until the month of August in the same year, was a customer of the plaintiffs, and kept an account at their branch at Truro.

3. At the time of the commencement of this action there was a balance of 106*l.* 4*s.* due from the defendant to the plaintiffs upon his banking account, unless he is entitled to be credited in such account with the amount of the cheque hereinafter mentioned, in which case nothing was due to them.

4. On Monday, the 4th of June, 1866, a person named Anderton, who kept an account with Hawkey & Co., bankers, carrying on business at Falmouth, in Cornwall, drew a cheque on them for 106*l.* 4*s.* in favour of the defendant. This cheque was received by the defendant at Truro on the afternoon of the same day, and on the following morning, Tuesday, the 5th of June, was paid by him to the plaintiffs to the credit of his account with them at their Truro branch.

5. The plaintiffs had not any branch establishment or agent at Falmouth (which is about ten miles from Truro); but there was direct postal communication twice every day between these places; letters posted in the morning at Truro before half-past seven o'clock were delivered at Falmouth before ten, and those posted in the afternoon before four were delivered before six. The business hours of Hawkey & Co., at Falmouth, were from ten till three, but the clerks remained two or three hours later. Letters received by the afternoon post were not answered until the following morning, unless an answer by return of post was requested by the writer.

6. The manager of the plaintiffs' Truro branch sent the cheque by the post of Tuesday, the 5th of June (the same day on which it was paid in) to their London agents, Messrs. Barclay & Co., who received it on the morning of the 6th of June.

7. On the same day (Wednesday, the 6th of June) the cheque was handed by Barclay & Co., through the clearing-house, to the Agra and Masterman's Bank, who then were the London agents of Hawkey & Co., upon whom the cheque was drawn.

8. The Agra and Masterman's Bank, by post of the same day (Wednesday, the 6th of June), forwarded the cheque to Hawkey & Co., at Falmouth. The Agra and Masterman's Bank was open until the close of banking hours, namely, five o'clock, on the 6th. It subsequently, on the same evening, was known that the bank had suspended payment and would not reopen on the following day. On the morning of the 7th the doors were closed.

9. Hawkey & Co. received the cheque in due course of post on the morning of Thursday, the 7th, when they knew of the suspension of the Agra and Masterman's Bank. They then debited Mr. Anderton's (the drawer) account with the amount, and cancelled the cheque; and by the post of the same day wrote to the Agra and Masterman's Bank, requesting them to pay the cheque on their account. They did not remit any funds to the Agra and Masterman's Bank to meet the cheque. The Agra and Masterman's Bank received Hawkey & Co.'s letter on Friday, the 8th of June. The cheque was not paid to Barclay & Co., and still remains unpaid.

10. Upon the suspension of the Agra and Masterman's Bank, Barclay & Co. wrote, on Thursday, the 7th, direct to Hawkey & Co., at Falmouth, requesting them either to pay the cheque or return it.

11. On Friday, the 8th of June, 1866, Hawkey & Co. replied by letter to Barclay & Co. refusing either to pay the cheque or return it, alleging that they had debited Anderton's account with the amount of the cheque, and directed the Agra and Masterman's Bank to pay it.

12. On Saturday, the 9th of June, Hawkey & Co. suspended payment, and have never resumed payment.

13. The cheque was retained by Hawkey & Co., and by the trustees appointed for winding up their affairs, until the 25th of October, 1866, when, acting under legal advice, they returned it to the plaintiffs, who offered to return it to the defendant's solicitor about a week after it had come to their hands, but he declined to receive it.

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14. On Saturday, the 9th of June, the manager of the plaintiffs' Truro branch saw the defendant, and informed him of the fact of nonpayment of the cheque, stating that he did not know in whose possession it was, but would write and obtain the information; he also subsequently informed the defendant that his account had been debited with the amount of it. The account was not so debited until the 23rd of June, 1866. It is the ordinary usage of bankers, when a cheque is paid in by a customer, to enter the amount to his credit, and if such cheque is not paid, immediately upon its dishonour to return it to the customer, and upon so doing to debit his account with it.

15. The course pursued by the plaintiffs in forwarding the cheque to their London agents, to be presented to the London agents of Hawkey & Co., through the clearing house, was, in 1866, the usual and ordinary course pursued by country bankers out of Cornwall. It was also the usual and ordinary course pursued by bankers in Cornwall with respect to cheques drawn upon banks out of Cornwall. It was also the usual and ordinary course pursued by the plaintiffs, whether the bank upon which the cheque was drawn was in or out of Cornwall. It was also the usual and ordinary course pursued by the banks in Cornwall with respect to cheques drawn upon the plaintiffs' Cornwall branches. With respect to cheques drawn upon one Cornwall bank and paid into another, an arrangement or understanding had existed for many years amongst the principal banks in Cornwall as to the presentation of such cheques. The practice pursued under such arrangement or understanding was as follows:—

The cheque was sent by post to the bank upon which it was drawn. A settlement took place every Saturday between the bank sending and the bank receiving such cheque with respect to all cheques which during the preceding week had been so sent from one to the other, and the balance due from one bank to the other, upon such settlement, was paid in London on the Tuesday following. The plaintiffs had never been parties to such arrangement, nor had any newly-established bank. It was confined to the private banks. If the plaintiffs had followed such practice in the present case, the cheque in question would have been received by Hawkey & Co. on Wednesday, the 6th of June. It would on the same day

have been cancelled by them, and charged to the account of Anderton & Co., and the plaintiffs credited with the amount of it. The accounts for the preceding week between the plaintiffs and Hawkey & Co. would, if Hawkey & Co. had not suspended payment, have been balanced in the country on Saturday, the 9th of June, and the balances would have been paid in London on Tuesday, the 12th of June.

16. The defendant was not aware of the practice followed by the plaintiffs of sending through the clearing houses in London cheques drawn upon banks in Cornwall, nor was he aware of the practice followed by other Cornwall banks.

17. In the month of May, 1867, a meeting of Cornwall bankers was held. The plaintiffs were not parties to this meeting, and were not represented at it. At this meeting resolutions were come to that for the future all cheques upon other banks in Cornwall paid in by customers should be passed through the London clearing house, and that notice of such resolution should be issued by the bankers parties to such meeting to their respective customers. After this meeting such notice was issued accordingly.

18. After the stoppage of Hawkey & Co., and before the defendant ceased to be a customer of the plaintiffs, they inserted the following notice in the pass-book of the defendant:—"Cheques on bankers. The Devon and Cornwall Banking Company undertakes only to forward the above by post for collection; to become answerable for the proceeds when they are actually received (notwithstanding such cheques may have been credited to the accounts of customers for whom they were received), but the company does not undertake to give notice of delay of payment, any loss from which or from theft, fraud, insolvency, or otherwise, is to be at the customer's risk."

19. The Court were to be at liberty to draw any inference of fact which a jury might draw.

The question for the opinion of the Court was, whether upon the facts above stated the plaintiffs, at the time of the commencement of this action, were entitled to debit the defendant with the amount of the cheque.

Coxon (*Field, Q.C.*, with him), for the plaintiffs. The case is con-

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cluded by authority. *Hare* v. *Henty* (1), shews that both presentment and notice of dishonour of the cheque were in time.

THE COURT then called upon

Sir George Honyman, Q.C., for the defendant. The plaintiffs received the cheque on the 5th of June, and they ought to have sent it to Falmouth on the 6th, for when they received the cheque from the defendant, they became his agents to receive its amount as early as possible: *Kilsby* v. *Williams.* (2) Had they done so, the cheque would have been paid. According to *Bailey* v. *Bodenham* (3), sending the cheque to Hawkey & Co. constituted them the agents of the plaintiffs; the cheque was practically dishonoured on the 7th of June, and therefore the defendant ought to have received notice of dishonour on the 8th. Moreover, the plaintiffs, by the manner in which they have dealt with the cheque, have made it theirs: Hawkey & Co. must be treated as their agents, they debited the drawer in account, and the defendant is therefore exempted from liability. At all events, at the time when the notice of dishonour was given to the defendant, the cheque ought to have been handed to him to enable him to sue the drawer. The usage of bankers, set out in paragraphs 15 and 16, is not binding on the defendant, because it was not the universal usage of bankers in Cornwall; nor had he any notice of it: *Hudson* v. *Ede* (4); *Sweeting* v. *Pearce.* (5)

LUSH, J. I am of opinion that the plaintiffs are entitled to judgment. I do not think that there has been any laches either in the presentment of the cheque, or in giving notice of dishonour. According to *Hare* v. *Henty* (1), the cheque was presented in due time. The plaintiffs received it on the 5th; they might have sent it on the 6th to an agent at Falmouth, and the agent might have presented it on the next day to the drawees, which presentment would have been in time. According to the authorities, it is immaterial through whose hands the cheque is sent, provided it reaches the drawees in due time. The next question is whether a valid notice of dishonour was given to the defendant. According

(1) 10 C. B. (N.S.) 65; 30 L. J. (C.P.) 302. 7 Jun 1859.
(2) 5 B. & A. 815, 819.
(3) 16 C. B. (N.S.) 288; 33 L. J. (C.P.) 252. 10 Jun 1859
(4) Law Rep. 3 Q. B. 412.
(5) 9 C. B. (N.S.) 534; 30 L. J. (C.P.) 109. 7 Jun 1860

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to the opinion of Erle, C.J., in the cases cited (1), a presentment through the post office is a reasonable mode of presentment; it is a very common mode, and having regard to the commercial business of this country it may be said to be a proper mode of presentment. If the drawee dishonours the cheque, and the holder sends a notice of dishonour to the person from whom he received the cheque on the day following that on which the cheque was dishonoured, each previous transferror has one day in which to give notice of dishonour. Here the drawees received the cheque on the 7th; on the 8th they notified to Barclay & Co., the agents of the plaintiffs, that the cheque was dishonoured, and on the 9th the defendant receives notice of dishonour from the plaintiffs; therefore the notice was received by him in due time. It was further objected that, although due notice of dishonour was given, the cheque itself was not handed over. I think that makes no difference in the liability of the defendant in the present action, nor does it affect any rights he may have against the drawer of the cheque. It is sufficient that the defendant received notice of the dishonour of the cheque in time to enable him to give a valid notice to the drawer. If the defendant did give such a notice in time, he will have his remedy; but if for any reason the defendant's notice to the drawer was too late, that is no fault of the plaintiffs, who have done all that the law requires, and are therefore entitled to maintain this action.

HANNEN and HAYES, JJ., concurred.

Judgment for the plaintiffs.

Attorney for plaintiffs: *Prideaux.*
Attorneys for defendant: *Hooke & Street.*

(1) *Hare* v. *Henty*, 10 C. B. (N.S) 65; 30 L. J. (C.P.) 302. *Bailey* v. *Bodenham*, 16 C. B. (N.S.) 288; 33 L. J. (C.P.) 252.

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May 4.

DE ROSAZ *v.* THE ANGLO-ITALIAN BANK, LIMITED.

Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 161 & 162—*Arbitration—Appointment of Umpire by Judge's Order—Companies Clauses Consolidation Act*, 1845 (8 *Vict. c.* 16, *ss.* 128—134)—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 12—*Action upon Award—Shareholder, Purchase of Interest of—Joint Stock Company, Voluntary Winding-up of—Equitable Plea.*

Declaration, that the defendants were a banking company incorporated under the Companies Act, 1862; that a resolution was passed for the winding up of the company and the transfer of the business to another company; that plaintiff was a shareholder in the first company, and expressed a dissent in writing as required by s. 161 of the statute, and required the liquidators either to abstain from carrying the resolution into effect, or to purchase his interest; that by the articles of association, in the event of any difference arising between the company and any of the shareholders, such difference was to be referred to two arbitrators, one of the arbitrators to be named by each party; the arbitrators to appoint an umpire; and if they did not do so within fourteen days, an umpire might be appointed by a judge under the Common Law Procedure Act, 1854; that the dispute relating to the settling of the price of the plaintiff's shares was referred to two arbitrators; that they did not appoint an umpire; that an umpire was appointed by a judge; that the arbitrators did not agree; that the umpire duly made his award adjudging the price to be paid for the purchase of the plaintiff's interest at 2100*l.*, which sum he directed to be paid to the plaintiff, and further directed that the defendants should pay to the plaintiff his costs of the reference and award, and that the defendants did not pay the money. On demurrer:—

Held, 1. That an action would lie against the company on the award as in ordinary cases, as there was nothing in s. 161 of the statute which took away the right of action. 2. That the judge had power to appoint an umpire under the articles of association, or under the Companies Clauses Consolidation Act, 1845, supplemented by the Common Law Procedure Act, 1854, on the authority of *Re Anglo-Italian Bank and De Rosaz* (Law Rep. 2 Q. B. 452).

Plea to the declaration, on equitable grounds, that before the passing of the resolution the plaintiff was indebted to the defendants in respect of a call upon his shares, and the shares were liable to forfeiture, and that the defendants were proposing to reconstitute their bank, and that it was agreed that, in consideration that the defendants would forbear from pressing for payment of the money due to them, and would give the plaintiff time for payment, and would abstain from forfeiting the shares, the plaintiff promised to consent to the winding up of the company, if authorized by a general meeting, and that he would vote for the resolution, and exchange his shares for shares in the reconstituted bank; that the defendants performed their part of this agreement; that the proposal was authorized by a general meeting, and that the resolution was passed. On demurrer:—

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Held, that the plea only shewed grounds for a cross action by the defendants, and was no defence to the present action.

DECLARATION, that the defendants were a banking company formed and incorporated under the Companies Act, 1862 (25 & 26 Vict. c. 89), and a special resolution was passed at a meeting of the company on the 26th of September, 1866, and confirmed at a meeting of the company on the 24th of October, 1866, for the voluntary winding up of the company, the appointment of liquidators, and the transfer of the business of the company to another company. And the plaintiff, at the respective times of the making and confirmation of the resolution, was a member of and shareholder in the first-mentioned company, who did not vote in favour of the resolution at either of the meetings, and who duly and within seven days after the date of the meeting at which such resolution was passed expressed his dissent therefrom in writing addressed to the liquidators of the company, and left at the registered office of the company, pursuant to the provisions of s. 161 (1) of the statute,

(1) 25 & 26 Vict. c. 89, s. 161 :— "Where any company is proposed to be or is in the course of being wound up altogether voluntarily, and the whole or a portion of its business or property is proposed to be transferred or sold to another company, the liquidators of the first-mentioned company may, with the sanction of a special resolution of the company by whom they were appointed, conferring either a general authority on the liquidators or an authority in respect of any particular arrangement, receive in compensation or part compensation for such transfer or sale, shares, policies, or other like interests in such other company, for the purpose of distribution amongst the members of the company being wound up, or may enter into any other arrangement whereby the members of the company being wound up may, in lieu of receiving cash, shares, policies, or other like interests, or in addition thereto, participate in the profits of or receive any other benefit from the purchasing company; and any sale made or arrangement entered into by the liquidators in pursuance of this section shall be binding on the members of the company being wound up; subject to this proviso, that if any member of the company being wound up, who has not voted in favour of the special resolution passed by the company of which he is a member at either of the meetings held for passing the same, expresses his dissent from any such special resolution in writing addressed to the liquidators or one of them, and left at the registered office of the company not later than seven days after the meeting at which such special resolution was passed, such dissentient member may require the liquidators to do one of the following things as the liquidators may prefer, that is to say, either to abstain from carrying such resolution into effect, or to purchase the interest held by such dissentient member at a price to be determined in manner hereinafter mentioned, such purchase money to be paid

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and thereby required the liquidators to abstain from carrying the resolution into effect, or to purchase the interest held by the plaintiff in the company, at a price to be determined, as in the statute provided. And it was and is provided in and by the articles of association of the company as follows:—By Article 1, "That in the interpretation of the articles, the words and expression 'the statutes,' shall, unless excluded by the subject-matter or context, mean and include the Companies Act, 1862, and any and every other Act from time to time in force concerning joint stock companies, and necessarily affecting the company. By Article 196, "That whenever any difference shall arise between the banking company on the one hand, and any of the shareholders, their heirs, executors, administrators, or assigns, on the other hand, touching the true intent or construction, or the incidents or consequences of these presents, or of the statutes, or touching anything then or to be thereafter done, executed, omitted, or suffered, in pursuance of these presents, or of the statutes or touching any breach or alleged breach of these presents, or any claim or account of any such breach or alleged breach, or otherwise relating to the premises or to these presents, or to the statutes or to any of the affairs of the company, every such difference shall be referred to the arbitration of two persons." By Article 197, "That one of the arbitrators shall be named by each of the parties to the difference, and as regards any such party, whether consisting of one person or more persons than one;" and by Article 200, "That the arbitrators, before entering on the business of the reference shall by writing under their hands

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before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution."

s. 162:—"The price to be paid for the purchase of the interest of any dissentient member may be determined by agreement; but if the parties dispute about the same, such dispute shall be settled by arbitration, and for the purposes of such arbitration, the provisions of 'The Companies Clauses Consolidation Act, 1845,' with respect to the settlement of disputes by arbitration, shall be incorporated with this Act; and in the construction of such provisions this Act shall be deemed to be the special Act, and 'the company' shall mean the company that is being wound up, and any appointment by the said incorporated provisions directed to be made under the hand of the secretary, or any two of the directors, may be made under the hand of the liquidator, if only one, or any two or more of the liquidators if more than one."

appoint an impartial and qualified person to be their umpire," and by Article 201, "That if the arbitrators do not, within fourteen days after their appointment, appoint an umpire, then on the application of the parties in difference, or either of them, an umpire may be appointed by the governor of the Bank of England or by a judge, under the Common Law Procedure Act, 1854," and by Article 202, "That if the arbitrators do not, within thirty days next after the matter in difference is referred to them, agree on their award thereon, then it shall be referred to the umpire," and by Article 203, "That the award of the arbitrators or of the umpire if made by writing under their or his hands or hand, and ready to be delivered to the parties in difference, or such of them as desire it, their heirs, executors, administrators, or assigns, within thirty days next after the matter in difference is referred to the arbitrators, or, as the case may be, to the umpire, shall be binding and conclusive on all parties interested, their heirs, executors, administrators, and assigns, and all such things shall be forthwith thereafter done, omitted and suffered as the award requires," and by Article 208, "That the umpire shall have full power from time to time by writing under his hand, to extend the time within which his award is to be made, and if it be made and ready to be delivered as aforesaid, within the extended time, it shall be as valid and effectual as if made within the thirty days," and by Article 209, "That the costs of and incident to the arbitration and award shall be in the discretion of the arbitrators and the umpire respectively." That the requisition of the plaintiff not to carry the resolution into effect, not having been complied with, the plaintiff duly gave notice to the liquidators that he had appointed and he did appoint, one G. M. Fisher, an arbitrator, on his behalf, by whom the disputes and differences existing between him and the liquidators respecting the purchase of his shares and the amount to be paid to him for them should be determined, and required the liquidators to appoint an arbitrator on their behalf. And the liquidators afterwards appointed one J. F. H. Read an arbitrator on their behalf, by whom the disputes and differences should be determined. And the arbitrators did not within fourteen days after their appointment, appoint an umpire, and thereupon on the application of the plaintiff, by an order duly made under the provisions of the statute in that behalf

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by Lush, J., dated the 5th of February, 1867, Henry Macnamara, barrister-at-law, was appointed as umpire to decide the matters in difference between the parties. And that the arbitrators did not within thirty days next after the matters in difference were referred to them, agree on their award thereon. And that the umpire duly enlarged the time for making his award from time to time, until the 2nd of January, 1868. And that the umpire on the 6th of December, 1867, duly made his award, and did thereby adjudge and award that the price to be paid for the purchase of the interest of the plaintiff in the banking company was 2100*l.*, at which sum he assessed the price, and which sum he directed the defendants to pay to the plaintiff. And the umpire did further award and direct that the defendants should pay to the plaintiff his costs of and incident to the reference and the costs of the award, and should bear and pay their own costs of the reference, and the plaintiff's costs of and incident to the reference and the costs of the award were duly taxed and allowed to the plaintiff at 70*l.* 18*s.* 6*d.* The declaration then averred the performance of all conditions precedent, and alleged as a breach the nonpayment of the two sums above mentioned.

Demurrer and joinder.

Plea, on equitable grounds, that before the meeting of the banking company, at which the resolution in the declaration mentioned was passed, to wit, before the 26th of September, 1866, and before the accruing of any of the alleged causes of action, the plaintiff was the holder of 120 shares in the banking company, and was as such shareholder, indebted to the company in 600*l.* in respect of a call of 5*l.* upon each of the shares, whereby an action accrued to the banking company, and the plaintiff's shares became and were liable to forfeiture. And the defendants were then proposing to reconstitute the bank, and to pass the special resolution in the declaration mentioned, and it was then mutually agreed by and between the plaintiff and the defendants, that in consideration that the defendants would forbear from pressing the payment of the money then due and owing to them by the plaintiff, and would give the plaintiff time for the payment of the same, and would abstain from forfeiting his shares, the plaintiff promised to consent to the proposal of the directors, if duly authorized by a resolution

of a general meeting, or with such modifications as such general meeting should approve of. And that he would assent to and vote in favour of such special resolution when the same was passed and would not dissent therefrom, and that he would exchange his shares which he then held for a proportionate number of shares in the reconstituted bank. That the defendants did forbear from pressing the payment of the money then due and owing to them by the plaintiff, and did give the plaintiff time for the payment of the same, and did abstain from forfeiting his shares. And the proposal of the defendants was duly authorized by a resolution of a general meeting of the banking company, or with such modifications as they thought fit, and the special resolution was passed as in the declaration alleged.

Demurrer and joinder.

Holl, for the plaintiff. The question arising upon the demurrer to the declaration is, was the umpire lawfully appointed? The appointment may be supported on two grounds: first, it is valid under the articles of association; secondly, it was made in accordance with the Companies Clauses Consolidation Act, 1845, supplemented by the Common Law Procedure Act, 1854. By clause 196 of the articles of association, every dispute between the defendants' company and any of the shareholders is to be referred to the arbitration of two persons, one of whom by clause 197 is to be named by each of the parties to the difference. Now it appears from the record that a difference having arisen between the defendants and one of the shareholders, who was the plaintiff in this action, each of them, in accordance with these sections, named an arbitrator, but the arbitrators failed to comply with the requirements of clause 200, and omitted to appoint an umpire before entering upon the business of the reference. Then clause 201 applies, and it was proper that an umpire should be appointed "by a judge under the Common Law Procedure Act of 1854;" so that under s. 12 of that Act, as provided by clause 201, a judge has power to appoint an umpire. The difficulty created by the incorporation of the Companies Clauses Act, 1845, into the Companies Act, 1862, for the purposes of arbitration is only apparent. The Companies Clauses Act does not apply where the articles of association expressly point

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out the mode in which the arbitration is to be conducted. It is from the Companies Act, 1862, ss. 14, 16, that the articles of association derive their validity, and as between the company and its shareholders they have the force of a statute. Secondly, the judge had power under s. 12 of the Common Law Procedure Act, 1854, to appoint an umpire; this point is concluded by authority: *Re Lord* (1), *Re Anglo Italian Bank and De Rosaz.* (2) The plea is bad; it alleges matter which is only the subject of a cross action.

THE COURT then called upon

Matthews, Q.C. (*H. James* with him), for the defendants. The first objection is that the action will not lie. The object of s. 161 of the Companies Act, 1862, was to enable a company to transfer its business without the authority of a special act of parliament, and to prevent the transfer being defeated by the opposition of one or more dissentient shareholders. Section 161 is similar to s. 17 of 20 & 21 Vict. c. 14. From the words "such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by special resolution," it is clear that it is not the company but the liquidators who are to pay the price of the dissentient shareholder's interest. The raising of the money in the manner pointed out in the section is a condition precedent to bringing the action, and it is not averred in the declaration that a special resolution has been passed. The dissentient shareholder is not in the position of a creditor of the company; he is a contributory under s. 138, and can apply to the Court of Chancery to compel the payment of the sum awarded. Section 133 points out the mode in which the voluntary winding up is to take place, and the powers of the directors are transferred to the liquidators; until every creditor is paid the dissentient shareholder is entitled to nothing; the award merely fixes the price of his shares which is to be paid by the liquidators out of a particular fund at a future time. The plaintiff is still a member of the defendants' company, and therefore cannot sue at law. The object of s. 161 is to protect the interests of the other members of the company, not to benefit a dissentient shareholder at their expense.

Secondly, the appointment of the umpire was invalid. It can-

(1) 1 K. & J. 90; 24 L. J. (Ch.) 145. (2) Law Rep. 2 Q. B. 452.

not be upheld under the articles of association, because clause 196 refers only to differences between the defendants' company and a shareholder; now the defendants' company is not a party to the present dispute, but the dispute is between the plaintiff and the liquidators, who are not agents of, but a distinct body from, the defendants' company; moreover, s. 162 is imperative, and must be followed. Neither can the appointment be supported under the provisions of the Companies Clauses Consolidation Act, 1845, as supplemented by the Common Law Procedure Act, 1854. *Re Anglo Italian Bank and De Rosaz* (1) decides that the latter Act may be read as supplementary to the former; this, though a strained construction, would be binding on this Court; but it is not averred that the provisions in s. 12 of the Common Law Procedure Act, 1854, have been complied with; it may be that no written notice to appoint an umpire has been served, and that seven clear days after such notice were not allowed to elapse. Besides this is not an arbitration within the meaning of that section; it is only an ascertainment of a quantum of compensation: *Collins* v. *Collins* (2), *Bos* v. *Helsham*. (3)

Thirdly, the award is ultrà vires. The arbitrator had no power under s. 161 to direct the defendants to pay the price; the liquidators, not the defendants, are the parties who ought to be directed to pay; neither had he power to award costs.

[LUSH, J. If s. 161 implied a duty on the defendants to pay the sum awarded and the costs of the reference, the umpire might in express terms order them to be paid by the defendants; if it does not, that part of the award may be rejected as surplusage.]

Lastly, the plea is good. It sets out a contract by the plaintiff upon a good consideration to waive the right conferred on him by statute. But this was an agreement to discharge the right given by statute, and no doubt would be bad at law. A right conferred by statute is in the nature of a covenant which cannot be varied at law by a parol agreement before breach; but a parol agreement before breach when pleaded to an action on a covenant is a good equitable defence: *Nash* v. *Armstrong* (4), *De Pothonier*

(1) Law Rep. 2 Q. B. 452.
(2) 26 Beav. 306; 28 L. J. (Ch.) 184.
(3) Law Rep. 2 Ex. 72.
(4) 10 C. B. (N.S.) 259; 30 L. J. (C.P.) 286.

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v. *De Mattos* (1), and the plea is therefore an answer to the present action, which is brought to enforce a right under a statute.

Holl, in reply, was directed by the Court to confine himself to the first point made for the defendants. The effect of s. 95 and s. 133, par. 7, is to bestow on the liquidators of a company which is wound up voluntarily full power to bring or defend any actions or suits "in the name and on behalf of the company." They are, therefore, mere agents for the company, and are under no personal liability. There is no section in the Act which forbids an action to be brought; if an application were made to the Court of Chancery, it would be held that the plaintiff's claim is a mere debt, and that the remedy is at law only. The requiring a special resolution to provide the funds to pay the dissentient shareholder, is merely a direction how the money is to be raised. The company are to pass the resolution, and to raise the money; the section does not mean that the company, by abstaining from passing a resolution, are to be absolved from paying the money. They cannot take advantage of their own wrongful act.

LUSH, J. I am of opinion that our judgment should be for the plaintiff. The first objection is, that the award was not made by proper authority. That there is no power under the statute to appoint an umpire in the manner in which the umpire was appointed in this case, and therefore that the award of the umpire is of no force against the defendants. That depends on the construction to be put on the Companies Act, 1862 (2), the Companies Clauses Consolidation Act, 1845 (3), and perhaps upon the Common Law Procedure Act, 1854. (4) The Companies Act, 1862, s. 162, which prescribes the mode for ascertaining the price to be paid under the circumstances detailed in s. 161, enacts, that if the price to be paid for the purchase of the interest of a dissentient member cannot be determined by agreement between the parties, the dispute shall be settled by arbitration, and for the purposes of such arbitration the provisions of the Companies Clauses Consolidation Act, 1845, for the settlement of disputes by arbitration, shall

(1) E. B. & E. 461; 27 L. J. (Q.B.) 260.

(2) 25 & 26 Vict. c. 89.

(3) 8 Vict. c. 16.

(4) 17 & 18 Vict. c. 125.

be incorporated. There are various sections in the Companies Clauses Consolidation Act, 1845, referring to arbitration. There are sections which also contemplate the appointment of an umpire in the event of the arbitrators disagreeing, but there is no section which gives power to any person to appoint an umpire for the settling of a dispute in cases where the arbitrators differ or neglect to appoint an umpire. The only clause providing the means of appointing an umpire where the arbitrators disagree, is confined to disputes between claimants and railway companies, and then the umpire is to be appointed by the Board of Trade. But nothing in these sections warrants the appointment of the umpire by a judge. However, the case of *In re Lord* (1) before the present Lord Chancellor, then Vice-Chancellor Wood, sanctioned as it is by the decision of this Court in *Anglo-Italian Bank and De Rosaz* (2), is an authority that the Common Law Procedure Act, 1854, s. 12, would enable a judge to make that appointment. If I had to put a construction for the first time on that clause, I should hesitate in coming to the conclusion that s. 12 was meant to apply to a case of this kind. If the case rested merely on the sections of the Companies Clauses Consolidation Act, 1845, I should be bound by those decisions. But in the present case, the articles of association provide for the event that has happened. It is argued that they cannot apply, because s. 162 of the Companies Act, 1862, enacts, that disputes such as this shall be settled in the way pointed out by the Companies Clauses Consolidation Act, 1845. I think that cannot mean that those sections shall be resorted to where they are ineffective. I think that s. 162 merely enacts, that where the parties cannot agree they may resort to the sections of the Companies Clauses Consolidation Act, 1845, and treat them as incorporated in the articles of association; but where a special Act or the articles of association provide for the appointment of an umpire, then I think the parties are not driven to the Companies Clauses Consolidation Act, 1845, or to the Common Law Procedure Act, 1854. I think, therefore, the appointment of the umpire by a judge under clause 201 of the articles of association was valid, and therefore the umpire had authority to make the award between the parties.

Then comes the important question,—on which I have enter-

(1) 1 K. & J. 90; 24 L. J. (Ch.) 145. (2) Law Rep. 2 Q. B. 452.

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tained considerable doubt in the course of the argument, and I cannot say that that doubt is entirely removed,—whether an action may be brought on the award. The section is worded ambiguously as to this matter; but I think the right of a seller to recover by action the price fixed on his interest, is not taken away by s. 161, and that the company, the purchasers of that interest, are liable to an action for the price. [The learned Judge read s. 161]:—The section, in the event which happened here, namely, that of the plaintiff dissenting from the resolution, and requiring the liquidators to elect, gives them power to purchase the interest of the dissentient member, and if they cannot agree about the price, to have the price determined by arbitration. The liquidators did elect to purchase, and not being able to agree with the plaintiff about the price, did appoint an arbitrator. I regard the election to purchase and the appointment of arbitrators, as a contract made by the liquidators, by which the company were bound to pay for the interest of the plaintiff. Then it follows, unless there are some words restraining the ordinary right, that if the purchase-money is not paid, the seller would have a right to enforce the payment by action. Is there anything in this clause which takes away that primâ facie right? I was for a considerable time puzzled by the words of the latter part of the section, which did appear to me at one time to have the effect of making the payment as it were optional, as far as a court of law is concerned, and of driving the seller into a court of equity to enforce payment of the compensation. After enacting that the liquidators are to purchase the interest held by the dissentient member, at a price to be determined in manner thereinafter mentioned, the section proceeds: "Such purchase-money to be paid before the company is dissolved, and to be raised by the liquidators in such manner as may be determined by a special resolution." But I do not think that these words are inconsistent with the right of the plaintiff to sue the company through the liquidators, who are acting on behalf of the company, for the unpaid purchase-money. Payment is to be made before the company is dissolved, and this is equivalent to declaring that the company shall not be dissolved until they have paid; for otherwise, there could be no action against the company as a corporation; and those words may have

been put in for the purpose of preserving the liability of the company until the money was paid. Then again, "The money is to be raised by the liquidators in such manner as may be determined by special resolution." There is nothing to indicate that that resolution must be made before the seller is entitled to sue at law for the purchase-money: the resolution may be made after the payment. The liquidators may pay the price out of any funds in their hands, and may afterwards call a meeting of the shareholders, to determine how they are to be reimbursed. At all events, no means are pointed out by which the seller is enabled to compel the shareholders to pass any resolution for payment of the price. I cannot hold these words to have the effect of postponing his right to the payment of the money awarded to him, and I therefore come to the conclusion that, inasmuch as there has been a purchase of an interest at a price, and that price is to be paid at some time or other, a right of action has accrued against the company upon nonpayment of the purchase-money.

The remaining question is, whether the equitable plea affords any answer to this action. I am of opinion that it does not. The plea says, in effect, "you ought not to have the money awarded to you as the price of your interest, because at an antecedent period, when you were in arrear for calls, you asked for time to pay them, and we gave you time, on your agreement that when the meeting should be held you would vote in favour of the winding up; but when that meeting was held you broke that agreement." If the plaintiff did break the agreement, how could that disentitle him to the payment of the price of his interest? It may subject him, for aught I know, to an action for a breach of contract, but that is the utmost effect of it. The plea does not disclose any facts on which a court of equity could say, "you shall not recover the price of your interest, because you broke your contract with the company." Upon all these grounds I think our judgment should be for the plaintiff.

HANNEN, J. I am of the same opinion. I do not think it necessary to add anything to what has fallen from my Brother Lush on any other point than that as to the construction to be put on ss. 161 and 162 of the Companies Act, 1862. I take the meaning

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of s. 161 to be, that the liquidators acting for the company are to have the power of buying off the opposition of a shareholder to a proposed change or dissolution of the company. That is to be effected in the following manner;—upon a shareholder expressing his dissent, it becomes the duty of the liquidators to elect which of two courses they will pursue; they must either abstain from carrying their resolution, or purchase the interest held by the dissentient member. I reserve, for the moment, the question how the price is to be arrived at, whether by agreement or by arbitration. If the liquidators have manifested their election to purchase the interest, then, as it appears to me, it is not open to them afterwards to withdraw from that election. When the election is made, a valid contract is entered into for the purchase and sale of the interest of the dissentient shareholder; and it is immaterial whether the price is ascertained by agreement, or by the mode substituted for agreement, namely, by arbitration. The effect of that is, that there having been a bargain by the shareholder to divest himself altogether of his interest in the company, a duty has arisen on their part to pay him either the agreed or the awarded purchase money. If that construction be correct, I can see nothing to alter that which is the ordinary result of an agreement of purchase and sale at a price agreed or fixed by arbitration, namely, that the purchaser must pay the price agreed or fixed. The words of s. 161 seem to me to admit of a more reasonable interpretation than that assigned to them by the counsel for the defendants, who argued that they meant only this:—when the price has been agreed upon, or fixed by arbitration, then the company shall not have power to dissolve, and shall not by dissolution escape or evade payment, and shall remain incorporated until they shall have paid the purchase-money; and further, as between the liquidators and the company, whom they represent, the company shall pass a special resolution directing in what manner the liquidators are to raise the money. But there are no words in the statute expressly depriving of his right to sue by action a shareholder, in whose favour an award has been made, or to whom the company has agreed to pay the purchase-money. I therefore think the remedy by action exists, and that it will be open to the company either to plead to the action any circumstances relieving them

from their liability to pay, or to institute proceedings in chancery, alleging equitable grounds why they should not do that which they are primâ facie bound to do, namely, to pay the money. I abstain from touching on the other points, which seem to me to have been exhausted by my Brother Lush. I think, for the reasons he has given, that our judgment should be for the plaintiff.

HAYES, J. I am entirely of the same opinion. It is unnecessary for me to add anything to what has been already said by the Court. I was perplexed during the argument by the difficulty that a partnership seemed to me to exist between the plaintiff and the other shareholders; but I think that the plaintiff may be considered to have withdrawn from the partnership; and power is given by the statute to those who remain members of the partnership to buy the interests of the others. When a member of an ordinary partnership retires, and enters into an agreement with the continuing partners for the sale of his share, he can sue them at law for any breach of their agreement; in like manner, the liquidators acting for the company are empowered to enter into a contract to purchase the shares of a dissentient shareholder. What is the meaning of the word "purchase?" The shareholder is to transfer his shares to the liquidator, and they are bound to pay the purchase-money to him, and as the ordinary remedy at law for the price of shares sold is not expressly taken away by the statute, the plaintiff is entitled to maintain the present action.

Judgment for the plaintiff.

Attorneys for plaintiff: *Ewbank & Partington.*
Attorneys for defendants: *Bircham, Dalrymple, Drake, & Co.*

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May 7.

STOREY *v.* ASHTON.

Master and Servant—Negligent Driving of Servant—Course of Employment.

8 C.P. 565–6, 568; 2 Q.B.D. 281; 2 C.P.D. 358; 6 Q.B.D. 319, 321

The defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles; on their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty, and driving to the defendant's offices, depositing the bottles, and taking the horse and cart to stables in the neighbourhood, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's; and while they were thus driving the plaintiff was run over, owing to the negligence of the carman:—

Held, that the defendant was not liable: for that the carman was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant.

Declaration. That the defendant was possessed of a horse and cart then being driven under the control of a servant of the defendant, and, by the servant's negligence in driving, the horse and cart were driven over the plaintiff, who was crossing a certain highway, to wit, the City Road.

Pleas: 1. Not guilty.

2. That the horse and cart were not under the control of the defendant's servant.

Issue joined.

At the trial before Hannen, J., at the sittings in Middlesex, during Trinity Term, 1868, it appeared that the plaintiff, a child of six years old, was on the 23rd of February, 1867, run over in the City Road by a horse and cart of the defendant, driven by a servant of the defendant.

The defendant was a wine merchant having offices in Vine Street, Minories. On the day in question, which was a Saturday, the defendant sent a clerk and a carman with a horse and cart to deliver wine at Blackheath. They delivered the wine and received some empty bottles, and it was then the duty of the carman to have driven back direct to the defendant's offices, left the empties there, and taken the horse and cart round to the stables in the neighbourhood; instead of doing this, it being after business hours (3 P.M.) on Saturday, the carman, after he had crossed London Bridge, when about a quarter of a mile from home, instead of turning at the statue in King William Street to the east toward the Minories,

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at the persuasion of the clerk drove northward to the clerk's house, near the City Road, and thence to fetch a cask (which the clerk had sold to a cooper in the city), from the house of the clerk's brother-in-law at Barnsbury; and it was while they were driving along the City Road towards Barnsbury that the accident happened to the plaintiff.

There was contradictory evidence as to who was in fault; but by consent the only question left to the jury was the amount of damages; and a verdict was directed for the defendant, with leave to move to enter it for the plaintiff for 80*l*., the amount found by the jury, if the Court should be of opinion, on the evidence, that the defendant was liable for the negligence of his servant.

A rule having been obtained accordingly,

Prentice, Q.C., and *A. L. Smith*, shewed cause. The carman, when he caused the injury to the plaintiff, was not acting in the employment of the defendant so as to make him liable for the negligence of which it must be assumed on the finding of the jury the carman was guilty. When the carman, yielding to the request of the clerk, drove directly away from his road home, he was no longer driving in the defendant's employment. It being after business hours both the clerk and carman used the cart and horse as their own. The circumstances of the present case are not distinguishable from those in *Mitchell* v. *Crassweller*. (1) There, the defendants' carman having finished the business of the day, returned to their shop in Welbeck Street with their horse and cart, and obtained the key of the stable, which was close at hand; but instead of going there at once and putting up the horse, as was his duty, he drove to Euston Square, and on his way back negligently drove over the plaintiff; and it was held that the carman was not at the time engaged in his master's business so as to make him liable. In that case Maule, J., says, "At the time of the accident the servant was not going a roundabout way to the stable, and, as one of the cases expresses it, making a détour. He was not engaged in the business of his employers. But in violation of his duty, so far from doing what he was employed to do, he did something totally inconsistent with his duty, a thing having no connection whatever with his employer's service. The servant only is

(1) 13 C. B. 237; 22 L. J. (C.P.) 100.

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liable, and not the employers. All the cases are reconcileable with that. The master is liable, even though the servant in the performance of his duty is guilty of a deviation or failure to perform it in the strictest and most convenient manner. But where the servant, instead of doing that which he is employed to do, does something which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for the negligence of the servant in doing it." And Cresswell, J., says, "I agree, that under the circumstances, the carman cannot be said to have been acting in the employ of the defendants at the time the injury complained of was done, so as to make them responsible in damages for his negligence. No doubt if a servant in executing the order express or implied of his master, does it in a negligent, improper, and roundabout manner, the master may be liable. But here the man was doing something which he knew was contrary to his duty, and a violation of the trust reposed in him."

THE COURT then called upon

Digby Seymour, Q.C., and *Finlay*, in support of the rule. *Mitchell* v. *Crassweller* (1) is distinguishable. There, the servant had reached home and then made a fresh start. Here the carman was at least a quarter of a mile from home, and he had still the empty bottles to take home, so that he can only be said to have been making a deviation from his way home, and he was acting therefore in the defendant's employment. In *Joel* v. *Morison* (2), Parke, B., laid down the law to the jury thus, "If the servants, being on their master's business, took a détour to call upon a friend, the master will be responsible . . . The master is only liable where the servant is acting in the course of his employment. If he was going out of his way, against his master's implied commands, when driving on his master's business, he will make his master liable; but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable." Again, in *Sleath* v. *Wilson* (3), the facts were, that the servant after putting his master down in Great Stamford Street, was directed to drive to the Red Lion stables in Castle Street, Leicester Square, instead of which he drove to Old Street Road to deliver a parcel of his own,

(1) 13 C. B. 237; 22 L. J. (C.P.) 100. (2) 6 C. & P. at p. 503.
(3) 9 C. & P. 607, 612.

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and on returning thence to Leicester Square drove over and injured a person. And Erskine, J., told the jury, "It is quite clear that if a servant, without his master's knowledge, takes his master's carriage out of the coach-house, and with it commits an injury, the master is not answerable; and on this ground, that the master has not intrusted the servant with the carriage. But whenever the master has intrusted the servant with the control of the carriage, it is no answer that the servant acted improperly in the management of it. If it were, it might be contended that if a master directs his servant to drive slowly, and the servant disobeys his orders and drives fast, and through his negligence occasions an injury, the master will not be liable. But that is not the law: the master in such a case will be liable, and the ground is, that he has put it in the servant's power to mismanage the carriage by intrusting him with it. And in this case I am of opinion that the servant was acting in the course of his employment, and till he had deposited the carriage in the Red Lion stables, in Castle Street, Leicester Square, the defendant (his master) was liable for any injury which might be committed through his negligence." *Whatman* v. *Pearson* (1) also shews that until the master's business is finished, the servant, however much he may disobey the order of his master, is acting in the master's employment so as to make the master liable for his negligence.

COCKBURN, C.J. I am of opinion that the rule must be discharged. I think the judgments of Maule and Cresswell, JJ. in *Mitchell* v. *Crassweller* (2) express the true view of the law, and the view which we ought to abide by; and that we cannot adopt the view of Erskine, J., in *Sleath* v. *Wilson* (3), that it is because the master has intrusted the servant with the control of the horse and cart that the master is responsible. The true rule is that the master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment as servant. I am very far from saying, if the servant when going on his master's business took a somewhat longer road, that owing to this deviation he would cease to be in the employment of the master, so as to divest the latter

(1) Law Rep. 3 C. P. 422. (2) 13 C. B. 237; 22 L. J. (C.P.) 100.
(3) 9 C. & P. 607, 612.

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of all liability; in such cases, it is a question of degree as to how far the deviation could be considered a separate journey. Such a consideration is not applicable to the present case, because here the carman started on an entirely new and independent journey which had nothing at all to do with his employment. It is true that in *Mitchell* v. *Crassweller* (1) the servant had got nearly if not quite home, while, in the present case, the carman was a quarter of a mile from home; but still he started on what may be considered a new journey entirely for his own business, as distinct from that of his master; and it would be going a great deal too far to say that under such circumstances the master was liable.

MELLOR, J. I am of the same opinion. Generally speaking, the master is answerable for the negligent doing of what he employs his servant to do; and it is not, as Cresswell, J. says, because the servant in executing his master's orders, does so in a roundabout way, that the master is to be exonerated from liability. But here, though the carman started on his master's business, and had delivered the wine and collected the empty bottles, when he had got within a quarter of a mile from the defendant's office, he proceeded in a directly opposite direction, and as soon as he started in that direction he was doing nothing for his master; on the contrary, every step he drove was away from his duty.

8 C.P. 569.

LUSH, J. I am of the same opinion. The question in all such cases as the present is whether the servant was doing that which the master employed him to do. If he was, the master is liable for the negligence just as if he himself was guilty of it. Here the employment was to deliver the wine, and carry the empty bottles home; and if he had been merely going a roundabout way home, the master would have been liable; but he had started on an entirely new journey on his own or his fellow-servant's account, and could not in any way be said to be carrying out his master's employment.

HANNEN, J., concurred.

Rule discharged.

Attorneys for plaintiff: *Dubois & Maynard.*

Attorneys for defendant: *Plews & Irvine.*

(1) 13 C. B. 237; 22 L. J. (C.P.) 100. 17 Jur. 716

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1869
May 7.

Bankrupt—Fraudulent Preference—Relation of Title of Assignees—Money had and received.

In July, J., being indebted to the defendant in between 200*l.* and 300*l.*, and to other creditors in about 170*l.*, voluntarily gave the defendant a bill of sale of all his goods, stock in trade, &c., with a power to enter and sell if the amount owing were not paid on demand. In October the defendant entered and sold the goods, realizing less than the debt. In November, J. was adjudged a bankrupt on his own petition; and the plaintiff, having been appointed creditors' assignee, sued the defendant for the conversion, and for money had and received:—

Held, that, as the adjudication was on the bankrupt's own petition, and there was therefore no relation back so as to make the bill of sale an act of bankruptcy, the goods were the defendant's own when he sold them, and an action would not lie for the conversion, nor could the proceeds be money had and received to the use of the plaintiff.

Rord in Ex 5 2B. 275.

DECLARATION by plaintiff as creditors' assignee of R. P. Jackson, a bankrupt.

First count, that before Jackson was a bankrupt, defendant converted to his own use and wrongfully deprived him of goods.

Second count, that after the bankruptcy defendant converted goods belonging to plaintiff as assignee.

Third count, for money had and received by defendant to the use of plaintiff.

Pleas: 1. To first and second counts, not guilty.

2 & 3. To first and second counts respectively, a traverse of the property in the goods as alleged.

4. To third count, never indebted.

At the trial before Hannen, J., at the York spring assizes, 1868, it appeared that on the 26th of July, 1867, one Jackson, a jeweller and watchmaker, being indebted to the defendant in between 200*l.* and 300*l.*, and in about 170*l.* to other creditors, voluntarily assigned all his goods, stock in trade, &c., to the defendant, with a power to him to enter Jackson's premises, and sell the goods comprised in the bill of sale, if the amount owing by Jackson to the defendant were not paid on demand.

On the 19th of October the defendant, after demand and non-payment, entered and sold the goods.

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On the 26th of November Jackson was adjudged bankrupt on his own petition of the same date.

On the 11th of December the plaintiff was appointed creditors' assignee.

There was evidence given of the circumstances under which the bill of sale was given; and in answer to a question put by the learned judge, the jury found that the giving of the bill of sale was a fraudulent preference within the Bankruptcy Acts; and a verdict was directed for the plaintiff for 202*l.*, the amount of the proceeds of the sale of the goods received by the defendant, with leave to move to enter a verdict for the defendant.

A rule was accordingly obtained, on the ground that there was no relation back to the date of the bill of sale, so as to entitle the plaintiff to recover, the adjudication having been on the bankrupt's own petition.

Overend, Q.C., and *Forbes*, shewed cause. It must be conceded, since the decision of the Exchequer Chamber in *Stevenson* v. *Newnham* (1), that the bill of sale was not void as an act of bankruptcy under s. 67 of 12 & 13 Vict. c. 106, because there is no relation back where the bankruptcy is on the bankrupt's own petition, so that trover will not lie; but the transaction having been found by the jury to be fraudulent, it is voidable as against the spirit of the Bankruptcy Acts.

[LUSH, J. Conceding that, must not the party against whom the transfer is fraudulent, disaffirm the contract while the goods remain in specie in the hands of the transferee? *White* v. *Garden*. (2)]

Yes, in order to maintain trover; but money had and received will lie for the proceeds: *Groom* v. *Watts*. (3)

[LUSH, J. The goods were the defendant's own when he sold.]

In *Young* v. *Billiter* (4) the House of Lords overruled the decision of the Exchequer Chamber (5), and held that a voluntary transfer to a creditor within three months of insolvency was not absolutely void, but voidable only at the election of the assignees,

(1) 13 C. B. 285; 22 L. J. (C.P.) 110.

(2) 10 C. B. 919; 20 L. J. (C.P.) 166.

(3) 4 Ex. 727; 19 L. J. (Ex.) 154.

(4) 8 H. L. C. 682; 30 L. J. (Q.B.) 153.

(5) 6 E. & B. 1; 25 L. J. (Q.B.) 169.

and that where the goods had been dealt with by the transferree before the title of the assignees accrued trover would not lie; but that was all that was decided. And Blackburn, J., in his opinion, says that he agrees with the judgment of Parke, B., delivered after his retirement from the bench by Crowder, J., and continues: "I think the better construction of the statute is, that the transaction is valid till the assignees indicate an intention to treat it as void, and consequently that the act of seizing or selling the goods under the authority of the transfer, whilst yet valid, cannot be treated as being a wrongful conversion . . . I think it right, however, to guard against it being supposed that in my opinion no action at the suit of the assignees would lie against the favoured creditor. On the contrary, I am strongly disposed to think that, as soon as the assignees avoid the transaction, they may, by an action for money had and received, or at all events by a properly shaped action, make the favoured creditor refund any benefit which he has wrongfully received." (1) And Wightman, J., after agreeing in opinion with Lord Wensleydale's judgment, adds: "It may be that the assignee might be entitled to succeed in a special action upon the case, or after a demand and refusal, but not in such an action as the present, in which the assignee proceeds as for a wrong done to the insolvent." (2) Most of the lords express similar opinions.

[LUSH, J. Those opinions are expressed upon the construction to be put on s. 59 of 1 & 2 Vict. c. 110, which expressly makes void voluntary deeds made by a person within three months of his insolvency, and the case is much the same as a voluntary deed or fraudulent preference, such as is made an act of bankruptcy in the case of an adverse adjudication of bankruptcy. But whether right or wrong, the effect of *Stevenson* v. *Newnham* (3) and subsequent cases is, to strike out of the statute the clause (s. 67 of the Bankruptcy Act, 1849) as to fraudulent preference so far as an adjudication on the bankrupt's own petition is concerned.]

The deed was void under the statute of Elizabeth. In *Nicholson* v. *Gooch* (4), which may be relied on by the other side, the money

(1) 8 H. L. C. at p. 692; 30 L. J. (Q.B.) at p. 156.

(2) 8 H. L. C. at p. 704; 30 L. J. (Q.B.) at p. 161.

(3) 13 C. B. 285; 22 L. J. (C.P.) 110.

(4) 5 E. & B. 999; 25 L. J. (Q.B.) 137.

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was paid over before the bankruptcy; here the money is in the hands of the defendant.

Field, Q.C., in support of the rule. There is not the slightest pretence for saying the bill of sale was fraudulent under the statute of Elizabeth; there was a large debt due to the defendant to the full value of the goods. That question, moreover, was not left to the jury. It is conceded that trover will not lie; why? because not being void as an act of bankruptcy, the bankruptcy being on the bankrupt's own petition, the goods had passed to and were at the time of the sale the defendant's own goods. If so, cadit quæstio. The defendant has done nothing since the title of the assignees accrued. The money was his own when he received it, and he had, of course, parted with it since in the course of his business. At all events, if it was his own when he received it, when did it become, or what is there to make it, money had and received to the use of the plaintiff?

[LUSH, J. I cannot see how a transaction, good at the time the goods were transferred to the defendant, good up to the time that he sold the goods, can become invalid except by some statute.]

COCKBURN, C.J. I am clearly of opinion that this rule must be made absolute. It is admitted that trover will not lie,—that is concluded by authority,—but the plaintiff relies on the money count. I am however at a loss to see how money had and received will lie: because the very reasons which are admitted to be valid to shew that trover will not lie, are equally valid against money had and received, viz., that the act of assignment being one which the bankruptcy laws do not make void, when once the creditor to whom the goods were assigned has sold them, the assignees cannot by any subsequent act revest the property in themselves; and I do not see how a creditor, when he has sold what at the time of the sale were his own goods, can be responsible to the assignee, or be said to hold the proceeds to the use of the assignee.

MELLOR, J. I am of the same opinion. I find it extremely difficult to see how the one proposition can be affirmed and the other denied. If trover will not lie, it is because the goods when sold were the property of the person who sold, not of the assignee.

The defendant had the property in the goods, and a right to part with them; if so, I cannot see how money had and received would lie at the suit of the assignee for the proceeds. I am not satisfied, I confess, as to how far this is consistent with the power of the assignee to disaffirm the transaction while the goods remain in specie; but we are precluded by authority from saying that trover will lie under the present circumstances, and if not, à fortiori the title of the assignee cannot relate back so as to make the money, which the creditor has received for his own property, money had and received to the use of the assignee.

LUSH, J. I am of the same opinion. The bill of sale was not fraudulent within the statute of Elizabeth; the transaction was perfectly good between the two parties, and the property passed to the defendant under the bill of sale. It is true that the jury, with reference to s. 67 of the Bankruptcy Act, 1849, have found that the transaction would have been fraudulent; and though valid at the time, it would have become invalid, had the bankruptcy been on the petition of a creditor, because that section makes such a grant of goods an act of bankruptcy, if it be one to which the title of the assignee can relate back. But *Stevenson* v. *Newnham* (1), and subsequent cases, have decided, that where the bankruptcy is on the bankrupt's own petition there can be no relation to an act of bankruptcy previous to the petition, and up to that time the bankrupt might lawfully pass the property in his goods to another, and the vendee might sell them. The sale, therefore, by the defendant, was perfectly lawful and valid; and if so the money he received for them was his own money, and cannot be money had and received to the use of the assignee. What is there in any of the statutes to give any title to the plaintiff? It is admitted that s. 67 of the Bankruptcy Act, 1849, is out of the question, and the statute of Elizabeth does not make such an assignment fraudulent.

HANNEN, J. I am of the same opinion. No doubt it is a very anomalous state of the law, that where a bankruptcy is on the bankrupt's own petition there is no relation back to any previous

(1) 13 C. B. 285; 22 L. J. (C.P.) 110.

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act of bankruptcy, as there is in the case of a creditor's petition; and it is impossible, therefore, to give a judgment altogether satisfactory. But the question is really settled by previous cases, for if the property in the goods had passed absolutely to the defendant at the time the defendant sold them, he sold his own goods, and it follows that the proceeds cannot be money had and received to the use of any one else.

Rule absolute.

Attorneys for plaintiff: *Singleton & Tattershall, for Unwin, Sheffield.*

Attorneys for defendant: *Doyle & Edwards, for Edwin Allen, Birmingham.*

May 11.

MOONE *v.* ROSE.

Gaoler—Discharge of Prisoner in Custody for Contempt—11 *Geo.* 4 *&* 1 *Wm.* 4, *c.* 36, *s.* 15—*Action—Trespass.*

56 R.J. 57
63
4 & D. 73-5
76
21 Ch D 231

M. was committed for a contempt of court in not answering to a bill in chancery. She was taken to gaol under a warrant addressed to the gaoler, which shewed on the face of it the cause of her committal. The plaintiff in the suit did not bring her to the bar of the court within thirty days; but the gaoler did not discharge her:—

Held, that the duty was cast in express terms on the gaoler by 11 Geo. 4 & 1 Wm. 4, c. 36, s. 15, to discharge the persons in his custody under such circumstances, and as the warrant gave him notice, he was bound to discharge M., after the lapse of thirty days, without an order from the sheriff or the Court of Chancery; and that an action of trespass would lie against him for detaining her.

TRESPASS for assaulting the plaintiff and imprisoning her for six calendar months and three days, from the 4th of December, 1864, to the 5th of June, 1865.

Pleas: 1. Not guilty by statute 4 Geo. 4, c. 64, ss. 73 and 75.

2. Leave and licence.

3. That before and during all the time, &c., defendant was the keeper of the gaol of and for the sheriff of the county of Devon in and for the said county, and a suit was then pending in the Court of Chancery, to wit, a suit in which Nicholas Moone was complainant, and the now plaintiff was defendant, and a writ of attachment issued out of the Court in the suit directed to the sheriff, whereby he was commanded to attach the now plaintiff

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and to bring her to the gaol, and deliver her to the keeper thereof, who was thereby directed to receive and keep her there safely, so that the sheriff might have her body before her Majesty, in her Majesty's Court of Chancery on the 28th day of November then instant, wheresoever the Court should then be, there to answer to her Majesty as well touching her contempt which the now plaintiff, as it was alleged, had committed against her Majesty, as also such other matters as should be then and there laid to her charge; and further, to perform and abide such order as her Majesty's Court should make in that behalf. And thereupon the writ was duly delivered to be executed to the sheriff of and for the said county, and the sheriff under and by virtue of the writ, and within his bailiwick, took and arrested the plaintiff, and carried and conveyed her to the gaol in and for the county, the same being the fit and proper place of confinement for her whilst in the custody of the sheriff, and the sheriff then and there delivered the plaintiff into the care and custody, of the defendant, as and being such keeper of the gaol, together with the warrant of the sheriff directed to the defendant, and whereby by virtue of the writ he commanded the defendant that he should receive and keep the plaintiff in the gaol safely, so that the sheriff might have her body before her said Majesty, in her Majesty's Court of Chancery on the 28th of November then instant, wheresoever the Court should then be, to answer to her Majesty, as well touching a contempt which the plaintiff, as it was alleged, had committed against her Majesty, as also such other matters as should be then and there laid to her charge; and further, to perform and abide such order as her Majesty's Court should make in that behalf. And the defendant, as and being such keeper of the gaol for the sheriff, and by his authority and command, then and there accordingly received and safely kept the plaintiff; and because neither the sheriff nor the defendant received nor had notice or knowledge of any writ of habeas corpus or other writ, rule, or order of the Court of Chancery, or other competent authority requiring the defendant to bring the plaintiff before her Majesty in her Majesty's Court of Chancery, or to discharge the plaintiff, or otherwise to deal with the plaintiff, then as aforesaid and as hereinafter mentioned, the defendant as and being the keeper of the gaol for the sheriff, and not otherwise, and by his

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authority and command safely kept and detained the plaintiff in the gaol for a certain space of time under and by virtue of the writ and warrant which are the supposed trespasses in the declaration alleged.

Joinder of issue.

Replication: 3. That the contempt for which the plaintiff was ordered to be attached was for not answering a bill filed in the High Court of Chancery, and that at the time of the arrest and confinement in the plea mentioned the sheriff and defendant had notice that the contempt for which the plaintiff was ordered to be attached was for not answering, and having such notice it became and was the duty of the defendant to discharge the plaintiff from custody, if the plaintiff was not brought to the bar of the High Court of Chancery within thirty days from the time of the arrest and confinement of the plaintiff; and the plaintiff was not brought to the bar of the Court within such thirty days, and the defendant did not discharge the plaintiff from custody, though he was requested to do so.

The plaintiff also new assigned to the third plea. Issue thereon.

There was also a demurrer to the third plea, and joinder in demurrer.

At the trial, before Hannen, J., at the sittings in Middlesex after Trinity Term, 1868, the following facts were proved:—The plaintiff was committed for a contempt of court for not answering to a bill in chancery filed against her to restrain her from cutting down some fruit trees on an estate of which she was tenant for life. She was delivered into the custody of the defendant, who was the gaoler of the Devon county gaol, on the 4th of November, 1864, under a warrant dated the 3rd of November, 1864, which required him to keep her there safely, so that he might have her body on the 28th of November instant, wheresoever the Court should then be, to answer to her Majesty as well touching a contempt which she, as it was alleged, had committed, as also such other matters as should be laid to her charge, and, further, to perform and abide by such order as her Majesty should make in that behalf. In the margin of the warrant it was stated the plaintiff was committed for not answering at the suit of N. M., complainant. The plaintiff in chancery not having, pursuant to the

11 Geo. 4 & 1 Wm. 4, c. 36, s. 15, subs. 5 (1), brought the plaintiff to the bar of the Court within the thirty days prescribed in the statute, the defendant did not discharge the plaintiff out of custody, but detained her until the 7th of June, when she was discharged.

The writ was issued on the 8th of April, 1868.

The jury found a verdict for the plaintiff for 25*l.*, and the judge reserved leave to move to enter a verdict for the defendant or a nonsuit.

A rule was accordingly obtained to enter a nonsuit or verdict for the defendant, on the grounds, that the action of trespass would not lie against the defendant, that the action was brought too late, that it ought to have been brought against the sheriff; and also for a new trial on the ground that the damages were excessive.

May 10. *Powell, Q.C.*, and *Anderson*, shewed cause. The statute of 11 Geo. 4 & 1 Wm. 4, c. 36, s. 15, subs. 5, makes it imperative on the gaoler to discharge the plaintiff after thirty days. The gaoler is one of the persons named in the subsection, and cannot

(1) 11 Geo. 4 & 1 Wm. 4, c. 36, s. 15, subs. 5, "That if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an habeas corpus to the bar of the court within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt; and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term; . . . . and in case any such defendant shall not be brought to the bar of the court within the respective times aforesaid, the sheriff, gaoler or keeper, serjeant-at-arms or messenger, in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued. . . ."

General Orders of Court of Chancery, Hil. Term, 1860:—Order xii., rule 3:—"Where a defendant is in prison under an attachment for not answering, or, being already in prison, is detained under such an attachment, and is not brought to the bar of the court within thirty days from the time of his being actually in custody, or detained (being already in custody) under such attachment, he shall be discharged from the process for want of answer under which he was arrested or detained by the sheriff, gaoler, or keeper of the gaol, in whose custody he is, without payment of the costs of his contempt, which, in such case, shall be paid by the plaintiff. . . ."

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excuse himself on the ground that he is the agent of the sheriff. The warrant stated in its margin the reason why the plaintiff was committed, and therefore the defendant had notice of his duty to discharge at the expiration of thirty days. In *Smith* v. *Eggington* (1), the sheriff had no notice of what the contempt was. *Fortescue* v. *Hallett* (2) is an authority that a detention after thirty days is illegal. The action being against the gaoler, trespass is the proper form, and the case is distinguishable from *Smith* v. *Eggington* (1), as the plaintiff has new assigned. As to the action having been brought too late, the defendant will rely on 4 Geo. 4, c. 64, s. 75, which provides "that all actions to be commenced against any person for anything done in pursuance of *this* Act shall be laid and tried in the county where the facts were committed, and shall be commenced within six months after the facts committed." That statute has no application to the present case. [They were then stopped.]

May 11. *Huddleston*, *Q.C.*, and *Bullen*, in support of the rule. First, the action ought to have been brought within six months, and the venue ought to have been local. No doubt 4 Geo. 4, c. 64, relates to the mode of imprisonment of lawful prisoners, but the treatment is not severable from the fact of imprisonment; and as the defendant kept the plaintiff in the manner required by the Act, and intended to treat her according to its provisions, he is sued for something done in pursuance of it, and the Act applies. Secondly, the cause of action is a neglect of duty to liberate the plaintiff, and the declaration ought to have been framed in case. *Smith* v. *Eggington* (1), *Salmon* v. *Percivall* (3), are expressly in point. Thirdly, the defendant is merely the agent of the sheriff, and is not liable in this action. He was bound to detain the plaintiff until he received an order to liberate her, from either the sheriff or the Court of Chancery. [They also contended that the damages were excessive.]

LUSH, J. This is, I think, a hard case on the gaoler, and I should have been better pleased if the damages had been nominal;

(1) 7 Ad. & E. 167. (2) 26 L. J. (Ch.) 711.
(3) Cro. Car. 196.

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but my Brother Hannen left the whole case to the jury, pointing out those facts which were calculated to diminish the amount of damages, and the jury have given such an amount as they thought the plaintiff, under all the circumstances, was entitled to; we cannot, therefore, say that the damages awarded are excessive.

The first question of law is, that the action is out of time, having been barred by 4 Geo. 4, c. 64, s. 75, which enacts, "that all actions to be commenced against any person for anything done in pursuance of this Act shall be laid and tried in the county where the facts were committed, and shall be commenced within six months after the facts committed." Although that Act has been repealed by 28 & 29 Vict. c. 96, s. 73, sch. 3 (1), still it it was in force at the time of the imprisonment, and, looking at the words of the Act, I should have held that the defendant was entitled to its protection, if it applied, but I am of opinion that it does not, for the action is not brought for anything done in pursuance of that Act. The 4 Geo. 4, c. 64, is for the regulation of gaols; it provides for the classification of prisoners, and prescribes the mode of treatment, and s. 75 gives an immunity to persons who have to carry out the provisions of the statute, but fail to do so. If this action had been brought for confining a prisoner in one part of the gaol when he ought to have been confined in another, or for a wrong done in the mode of treatment, the defendant would have been entitled to the benefit of the statute, but this action is brought for wrongfully keeping the plaintiff in prison after the time that she was entitled to go free had elapsed. The plaintiff, therefore, cannot claim the protection of the statute.

The second question is, whether the action ought to have been brought against the sheriff, or against the gaoler. This question turns on s. 15, subs. 5, of 11 Geo. 4 & 1 Wm. 4, c. 36. And I may as well also deal with the remaining question here, that the action was wrongly brought in trespass, and ought to have been an action on the case. Subs. 5 provides that where a defendant is in custody for contempt in not answering, and shall not have been sooner brought to the bar of the Court, under process, to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant, by a habeas corpus, to the bar of the

(1) This Act was passed on the 6th of July, 1865.

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court within thirty days from the time of his being actually in custody. . . . And in case the defendant shall not be brought to the bar of the court within the respective times, the sheriff, gaoler, keeper, &c., in whose custody he shall be, shall thereupon discharge him out of custody, without payment by him of the costs of contempt. . . . Here the plaintiff was kept in custody beyond the time that she ought to be kept in custody by the subsection. The statute makes it the imperative duty of the person in whose custody the party guilty of contempt is to discharge him, unless he be called to the bar of the court within the specified time. Whether he has been called to the bar or not must be known to the person in whose custody the prisoner is, because he is to be brought up by writ of habeas corpus, which would be directed to the gaoler. Now the statute names "sheriff, gaoler, keeper, serjeant at arms, or messenger in whose custody he shall be." It names the gaoler as an independent officer. He is not an agent of the sheriff, but an independent officer, recognized by the law as such, and bound to deal with the plaintiff without reference to the sheriff. The gaoler, therefore, having the plaintiff in custody, it was his duty to discharge her, and not having done so he is liable to an action.

This case is distinguishable from *Smith* v. *Egginton* (1) and *Salmon* v. *Percivall* (2); and I am of opinion, inasmuch as the statute makes it imperative upon the gaoler to discharge the plaintiff, on his not having discharged her at the end of the specified time he is liable to be sued in trespass. The rule, therefore, must be discharged.

HANNEN, J., concurred.

Rule discharged.

Attorneys for plaintiff: *Ditton & Warmington.*
Attorney for defendant: *G. F. Cooke.*

(1) 7 Ad. & E. 167. (2) Cro. Car. 196.

[IN THE EXCHEQUER CHAMBER.]

1869
May 11.

SHEPHERD *v.* HARRISON AND ANOTHER.

Principal and Agent to buy—Consignor and Consignee—Bill of Lading—When Property in Goods shipped is intended to remain in Consignee.

The plaintiff in England sent an order to P. & Co. at Pernambuco, to buy cotton for him within certain limits. They bought cotton on account of the plaintiff, and shipped it in the defendants' vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was taken deliverable to P. & Co.'s order, or assigns, paying freight. P. & Co. wrote to the plaintiff, advising the shipment and price and quality of the cotton, and saying: "Enclosed, please find invoice and bill of lading; we have drawn upon you for the amount in favour of our agents, to which we beg your protection." The invoice was sent direct to the plaintiff, but the bill of lading (which had been indorsed in blank by P. & Co.) was sent with the bill of exchange to P. & Co.'s agents in England. The agents wrote to the plaintiff, enclosing the two documents, and requesting his protection to the draft. The plaintiff retained the bill of lading, but returned the bill of exchange unaccepted on the ground that P. & Co. had not complied with the plaintiff's order. The plaintiff presented the bill of lading to the defendants, but they, having been informed of the circumstances under which the plaintiff held it, refused to deliver the cotton to him, saying they should deliver it to P. & Co.'s agents under a duplicate bill of lading, which the agents had retained. On a case stating the above facts, the Court having power to draw inferences of fact:—

Held (affirming the judgment of the Court of Queen's Bench), that the inference to be drawn was, that it was the intention of P. & Co. that the property in the cotton should not pass to the plaintiff unless he accepted the bill of exchange; that no property, therefore, passed to the plaintiff, and the defendants were right in refusing to deliver to him.

[So held by Kelly, C.B., Willes and Montague Smith, JJ., and Channell, B.; Cleasby, B., doubting.]

Quære, per Channell, B., whether the inference to be drawn would not have been the same if the bill of lading had been forwarded direct to the plaintiff by P. & Co. in their letter, inasmuch as the letter stated that they begged the plaintiff's protection to the draft.

ERROR from the judgment of the Court of Queen's Bench in favour of the defendant on a special case: ante, p. 196, where the case is fully set out.

Jordan (with him *Quain, Q.C.*), for the plaintiff, urged the same arguments as in the court below, and cited the same cases, and distinguished those cited for the defendants in the court below.

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He also cited *Walley* v. *Montgomery* (1); *Joyce* v. *Swann* (2); *Dracachi* v. *Anglo-Egyptian Navigation Company* (3); and *Coxe* v. *Harden* (4); and he relied especially on the last case, as undistinguishable from the present. There the consignor of goods abroad, on receipt of orders from correspondents in this country, shipped goods on account and at the risk of the consignees, and took bills of lading making the goods deliverable to the consignor's own order, and transmitted one of the bills, *unindorsed*, with the invoice, to the consignees, in a letter informing them that he had drawn upon them for the amount, which he doubted not would meet due honour and close the account. The consignor also sent another bill of lading, *indorsed*, to his own agent. And it was held that upon the shipment on account and at the risk of the consignees, the property vested in them, subject only to be divested by the consignor stopping the goods in transitu. He also contended that, at all events, the plaintiff was entitled to retain the bill of lading and return the bill of exchange unaccepted, inasmuch as it was drawn for a price beyond the limit given by the plaintiff, and also for a sum in excess of what was due for the particular cotton.

Holker, Q.C. (with him *Gully*), for the defendants, was not called upon.

KELLY, C.B. The case has been very ably argued by the counsel for the plaintiff, and if any doubt could have been raised in my mind it must have been suggested by that argument, but on looking at the whole case I have no doubt in the matter. The real questions are rather questions of fact than of law; but we have the assistance of many decided cases, and of what has fallen from learned judges, to guide us as to the conclusion to be arrived at, and as to the inferences to be drawn from the facts disclosed. The circumstances of the case are somewhat different from those of any case hitherto before the courts. [The Lord Chief Baron went through the facts.] The first question is, whether the plaintiff had a right to refuse acceptance of the bill of exchange and yet retain the bill of lading, and obtain possession of the goods from the de-

(1) 3 East, 585.
(2) 17 C. B. (N.S.) 84.
(3) Law Rep. 3 C. P. 190.
(4) 4 East, 211.

fendants, the shipowners. In other words, whether the property in the cotton had actually vested in the plaintiff, who was consignee, so as to entitle him to keep the bill of lading and refuse acceptance of the draft, subject to a cross action by the consignors, or whether the plaintiff was bound in law, according to the contract actual or implied by law, to accept the draft as a condition to his being entitled to keep the bill of lading. The contract between the parties was not reduced to writing, and the question, therefore, depends entirely on the correspondence set out in the case, and the acts shewn to have been done; and we must infer what were the respective rights and duties of the parties from this correspondence and these acts. The letter from Paton, Nash, & Co., of the 12th of November, 1867, is the first letter having an immediate bearing on the question. (1) This letter, inclosing an invoice (by which it was stated that the cotton was shipped on account and at the risk of the plaintiff), did not contain a bill of lading, although we find in the letter the expression, "Enclosed, please find invoice and bill of lading of 200 bales of cotton, per *Olinda*." The consignors had however obtained bills of lading from the captain making the cotton deliverable to their order or assigns, and they indorsed the bills of lading, and they forwarded them, not direct to the plaintiff, but sent them with the bill of exchange in a letter to their own agents at Liverpool; but what directions this letter contained we are not informed; we only know that the consignors did transmit the bill of lading to their agents.

Here, then, was a purchase of cotton on account of the plaintiff, and a consignment of cotton to the plaintiff, with invoices made out in his name, and further, "on account and at the risk" of the consignee; no bills of lading sent to him, but all sent to the agents of the consignors, and to them only. What are we, who are to draw inferences of fact, to determine is the effect of these facts? On the authority of *Coxe* v. *Harden* (2), we are called upon by the plaintiff's counsel to hold, as matter of law, that, by the mere fact of the shipment being on account and at the risk of the consignee, the property in the goods so shipped at once and irrevocably vested in the consignee. I am of opinion that it did not. No doubt, in the case of *Coxe* v. *Harden* (2), if we look at a single sentence in the

(1) Ante, p. 198.

(2) 4 East, 211, 218.

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judgment of Grose, J., that such a shipment vested the property in the consignees by law, subject only to be divested by stoppage in transitu, and had this been laid down as an abstract proposition of law independent of the particular circumstances of the case, it would be entitled to weight, and would be for the respectful consideration of this Court. But the facts of that case justified the language. The bill of lading was transmitted direct to the consignees, unindorsed it is true, but it enabled them to get possession of the goods, whether rightly or wrongly as far as the captain was concerned is immaterial; and there was nothing in the circumstances of the case to shew that the delivery of the goods was subject to any condition whatever, and the transaction was closed except only the payment of the money. Therefore the judgment in that case cannot be taken as laying it down as a proposition of law, that upon the shipment of goods on the consignee's account and risk, the property necessarily vests in him; and it leaves the question open to be decided by the peculiar facts of each case. In the present case, besides the fact of the invoice being on account and risk of the plaintiff, there is one fact peculiar to it, that the letter from Paton, Nash, & Co., of the 12th of November, forwarding the invoice and giving the account to the plaintiff, says the bill of lading is also enclosed, whereas they transmitted it through their own agents, accompanied by the bill of exchange for the price of the goods,—what is the inference to be drawn? That the consignors take the bill of lading deliverable to their own order, and transmit the bill indorsed to their agents, though we have not the letter to the agents before us, is cogent to lead us to surmise that the agents were authorized, if not directed, to take the course they pursued, and which it was their duty to take if they had no directions, viz., to send the bill for acceptance and not finally part with the bill of lading until they had the acceptance. And the inference I draw from the facts and course of dealing, so far as it is disclosed, is that the acceptance of the bill of exchange was, if not a condition precedent, to be a concurrent act with the delivery of the bill of lading. Stress has been laid upon the expression in the letter "Enclosed, please find invoice and bill of lading;" and it was urged that the bill of lading was omitted by mistake; and it was further urged that in a former transaction the omission was stated to be a mistake. But I do not draw any

such inference; the letter was written by a clerk (1), and I should rather infer that when it came to forwarding the letters with the documents, the principals withdrew the bill of lading, though from the hurry of business the expression in the letter was left as it was. Moreover, on the former occasion it was the agents and not the principals who said the sending of the bill of lading under cover to the agents was a mistake; and what the consignors did on the former occasion is precisely what they did in the present instance, and what they had done throughout their transactions with the plaintiff, viz. to forward the bill of lading under cover to their agents. We cannot therefore draw any inference in favour of the plaintiff from this expression in the letter of the 12th of November, 1867. On the contrary, the inference is strongly the other way when we advert to the letter of the consignors' agents to the plaintiff of the 5th of December (2), and the letter of the consignors to the plaintiff of the previous October (3), which are conclusive to shew that the intention was (and the question is one of intention only), that the bills of lading were to be handed to the plaintiff by the consignors' agents, as the consignors tell him they will be, on the plaintiff accepting the draft drawn by the consignors upon him,—that the handing over the bill of lading and the accepting the draft were to be concurrent acts. Throughout the transaction, the course has uniformly been for the consignors, though shipping the goods on account and at the risk of the consignee, to transmit the bills of lading, not direct to the plaintiff, but through their own agents with the bill of exchange; with the obvious purpose and intention to prevent the passing of the property until the bills of exchange had been accepted.

But another point was made for the plaintiff; it was insisted, whatever the course of dealing might have been, that the plaintiff had drawn for a larger sum than was due for the price of the goods, and that the price exceeded the plaintiff's limit, and therefore that he was not bound to accept the bill of exchange, and might retain the bill of lading. Possibly he was not bound to accept the bill, though I do not find any express limitation in the plaintiff's letter to the lower price, and the consignors seem to have a discretion left

(1) The letters of Paton, Nash, & Co., were all signed per pro.

(2) Ante, p. 199.

(3) Ante, p. 198.

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them in the matter. But, at all events, he had no right to repudiate the contract in part; if he did not accept the bill, he could have no right to the goods. On the former occasion, it may be observed, although he made objections to the price, the plaintiff accepted and ultimately paid the bills. (1)

For the above reasons, my opinion is that the intention evidenced by the letters and acts of the parties was, that the bill of lading was only to be handed over by the agents and retained by the plaintiff on his accepting the bill of exchange; and, consequently, that the plaintiff had no right to the cotton; and that the judgment pronounced by the Court of Queen's Bench, in favour of the defendants, was right, and ought to be affirmed.

WILLES, J. I am of the same opinion.

CHANNELL, B. I only wish to add a few words. It is quite clear that the bill of lading as to the 200 bales per *Olinda* was not covered by the letter of the 12th of November; it is equally clear that the bill of lading was sent to the consignors' agents, and not to the plaintiff, the consignee; but I am not quite satisfied, that, if the bill of lading had been covered by the letter, which says, "We have therefore drawn upon you a draft so and so, in favour of our agents, to which we beg your protection," the plaintiff would have been entitled to keep it without accepting the draft; for what the consignors said may well amount to saying, "We send you a bill of exchange for the price of the cotton for your acceptance, and the bill of lading, which you may keep on condition of your returning the draft accepted." The plaintiff, however, clearly repudiated the contract as far as he could, on the ground that his limit of price had been exceeded, and he had, therefore, no right to the goods; but if the bill of lading had been covered by the letter I doubt whether it would have altered the case.

MONTAGUE SMITH, J. I am also of opinion that the judgment should be affirmed.

CLEASBY, B. I am not prepared to dissent from the conclusion

(1) Ante, p. 198.

of the rest of the Court, although I entertained considerable doubt. Looking at the question as one of intention, I think when goods are shipped for and on account and at the risk of the consignee, primâ facie it must be the intention to pass the property to the consignee. Still, the question really depends on what disposition the consignors intended to make of the bill of lading; if they had sent it to the plaintiff, I cannot doubt the property would have been intended to pass; they did not, however, do so, but forwarded it to their agents in a letter; we have not that letter before us; the letter as it seems to me would have been evidence, and would have put an end to all doubt. Not having the letter, I must consider on whom the burthen of proof lies; and as the goods are shipped for and at the risk of the plaintiff, and the consignors send him a letter not inconsistent with his having the property in the goods, it did seem to me that this would shift the burthen of proof from the plaintiff, and make it incumbent on the defendants to shew that the intention of the consignors was not to pass the property to the plaintiff, by shewing the terms of the letter in which they forwarded the bill of lading to their agents. That was my difficulty. However, there are many facts in the case tending to the conclusion at which the Court has arrived; and I am not prepared to express a formal dissent from the judgment in favour of the defendants.

Judgment affirmed.

Attorneys for plaintiff: *Johnson & Weatheralls.*

Attorneys for defendants: *Chester & Urquhart, for Lace, Banner, & Co., Liverpool.*

1869
May 12.

[IN THE EXCHEQUER CHAMBER.]

FLEET, Administratrix of Mary Ann Ross, *v.* PERRINS.

Action—Husband and Wife—Chose in Action given to Wife during Coverture—Money had and received.

The defendant received money from a third person to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal. The wife died, and then the husband; and the wife's administratrix sued the defendant for money had and received to the use of the wife:—

Held (affirming the judgment of the Queen's Bench; Kelly, C.B., dissenting), that the action was rightly brought by the wife's representative, as the facts shewed only a chose in action conferred on the wife, with which the husband had not interfered during coverture.

Appeal from the decision of the Court of Queen's Bench, making a rule absolute to set aside a nonsuit and enter a verdict for the plaintiff. (1)

Declaration by the plaintiff, as administratrix of Mary Ann Ross, for money payable to the plaintiff as such administratrix, for money received by the defendant for the use of M. A. Ross, and for money found to be due on accounts stated between them, and for money due upon accounts stated between the plaintiff, as such administratrix, and the defendant.

Pleas: 1. Never indebted. 2. Payment. 3. That M. A. Ross, at her demise, was indebted to the defendant for money paid, and on accounts stated.

Issues thereon.

At the trial, before Lush, J., at the sittings in Middlesex, after Trinity Term, 1867, it was proved that the defendant was the aunt of Mary Ann Ross. In 1864, after the marriage of M. A. Ross, and while she was living with Thomas Rolph Ross, her husband, in India, the defendant, then residing in London, received certain money from one Henry Gardner for and on account of M. A. Ross. After the receipt of the money, the defendant wrote to M. A. Ross two letters, of which the following passages are material:—

"Aug. 1, 1864.

"My dear Niece,—I hope you will receive this letter, and that I shall soon hear from you. Make yourself quite content that I

(1) Law Rep. 3 Q. B. 536.

shall see to all your affairs and money matters the same as if you were here."

"Nov. 10, 1864.

"My dear Niece,—I received your letter yesterday, and write by return of post, on account of your wishing me to send you the money. You will receive my letter sent by last week's mail, where I state that I have received your money and put it at interest at 7 per cent.; but if you wish me to send it to you, after you know what the banks give here, I will do so, but pray be very careful how you invest your money in cotton, for there are several banks here which have failed in consequence of the cotton market going down; but I will leave it to you to do what you think best. All I hope is, that you will be well assured of the safety before you invest your money."

The father and sister of Thomas Rolph Ross severally proved that the defendant had admitted to them that she had received Annie's (meaning Mary Ann Ross's) money.

Mary Ann Ross died in India, on the 27th of December, 1864, and her husband died in 1866.

The following affidavit, made by the defendant, in answer to interrogatories, in an action wherein the present plaintiff, as administratrix of Thomas Rolph Ross, sued the defendant, was put in evidence, subject to objection. (1)

1. There was not, so far as I know or believe, any settlement executed on the marriage of Annie and T. R. Ross.

2 and 3. After the marriage, and in the month of October, 1864, and before the death of Annie Ross; I received from Henry Gardner a sum of money, out of which he requested and authorized me to apply, on his account, for the benefit of Annie Ross, the sum of 150*l.*, and the balance he paid to me on my own account; and out of the 150*l.* I did apply 31*l.* 17*s.* 10½*d.*, by paying a bill for goods supplied to Annie Ross; and I received no other such sum from Henry Gardner, or any other person or persons; and I have not, at any time, received any sum of money on account of Thomas Rolph Ross from any person or persons.

4. I did not pay the said money to Annie Ross, or Thomas

(1) The objections were taken in the Court below: see Law Rep. 3 Q. B. 536; but were abandoned in the Exchequer Chamber.

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Rolph Ross, or to any other person or persons, as their representatives.

5. I have not the said money in my possession, or any part thereof.

6. I deposited the sum of 150*l.* in the City Bank, and I afterwards, at the request and by the direction of Henry Gardner, repaid the money to him, less the 31*l.* 17*s.* 10½*d.* so applied as aforesaid.

7. I have received from the City Bank 2*l.* 13*s.* 10*d.* as interest, but do not know the rate at which such interest was calculated, and I have, at the request and by the direction of Henry Gardner, paid the said sum to him.

At the close of the case for the plaintiff, the defendant's counsel objected that the action could not be maintained by the plaintiff as administratrix of Mary Ann Ross, on the ground that it was for money received by the defendant for Mary Ann Ross during coverture, and that, as her husband survived her, the administratrix of the husband was alone entitled to sue for the recovery of it.

The learned judge nonsuited the plaintiff, but reserved leave to her to move to enter a verdict for 119*l.* 2*s.* 1*d.*, subject to the defendant's objections. The Court of Queen's Bench to have the same power to amend as a judge at nisi prius.

A rule was obtained, accordingly, to enter a verdict for the plaintiff for 119*l.* 2*s.* 1*d.*, which that Court made absolute. (1)

May 11. *Prentice, Q.C.* (*W. G. Harrison,* with him), for the defendant. This was money received to the use of the wife *after* marriage. The husband's representative, and not the wife's, is the proper person to sue for it. The test is, could an action have been maintained by the husband and wife during coverture? Clearly not; the money, whether a gift or the payment of a debt, as soon as it was paid to the defendant and he assented to hold it for the wife, became the husband's property. The only exception to the rule, that a married woman cannot have a contract made with her so as to enable her to sue, is the case of a bond or promissory note. [WILLES, J. There are a class of cases of contract in which the husband may elect to allow the wife an interest and join her in the

8 QB 514

(1) Law Rep. 3 Q. B. 536.

action, or he may sue alone; but if he dies without having commenced an action in his own name, the right survives to the wife.]

Bird v. *Peagrum* (1), is very much like this case, and there it was held that the money, though the produce of property settled to the use of the wife, was the husband's, for which he could sue jure mariti.

[WILLES, J. The money had been actually received by the wife, and was clearly the husband's as soon as it came to her hands; but if money be paid to a third person for the use of the wife, is it more than a chose in action?

CHANNELL, B. That is what the Court below say it was.]

Suppose an action had been brought for money had and received by the husband and wife, *Bidgood* v. *Way* (2) is directly in point that the action would have been wrongly brought. *King* v. *Basingham* (3), and *Abbot* v. *Blofield* (4), are also directly to the same effect. So a count by husband and wife on an account stated is bad without shewing the interest of the wife: *Johnson* v. *Lucas.* (5) *Carne* v. *Brice* (6), *Tugman* v. *Hopkins* (7), and *Molony* v. *Kennedy* (8), all shew that this money was the property of the husband. *Dalton* v. *Midland Railway Company* (9), referred to by the Court below, may be relied on by the other side; but all it decides is that railway stock is in the same category as bonds, and that the right to the dividends is a chose in action which the wife may put in suit, subject only to a plea in abatement. In the notes to *Wilbraham* v. *Snow* (10), cases are cited shewing that goods cannot be laid as converted to the use of husband and wife: for a married woman cannot in law convert to her own use; so neither can money be received to her use.

[WILLES, J., referred to *Betts* v. *Kimpton.* (11)]

May 12. *J. Brown, Q.C.* (with him *C. M. Griffith*), for the plaintiff. The facts shew nothing more than a chose in action; neither

(1) 13 C. B. 639; 22 L. J. (C.P.) 166.
(2) 2 W. Bl. 1236.
(3) 8 Mod. 199.
(4) Cro. Jac. 644.
(5) 1 E. & B. 659; 22 L. J. (Q.B.) 174.
(6) 7 M. & W. 183.
(7) 4 M. & G. 389.
(8) 10 Sim. 254.
(9) 13 C. B. 474; 22 L. J. (C.P.) 177.
(10) 2 Wms. Saund. 47 *a.* n. (h).
(11) 2 B. & Ad. 273.

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the husband nor wife could have sued until the defendant attorned to the wife: *Williams* v. *Everett.* (1) The letters are a contract or promise to the wife. The promise only gives a right of action in one or both at the election of the husband during coverture; but no property in any specific coin passed to the wife, and, consequently, none to the husband. *Attorney-General* v. *Partington* (2) shews that the wife's representative and not the husband's is the person to sue, when the husband has done nothing in the matter before or since the wife's death. The cases are collected in Williams on Executors, pp. 797, et seqq., the chief of which are *Howard* v. *Oakes* (3), and *Gaters* v. *Madeley.* (4) In the last case a promissory note had been given to the wife by the defendant for money she had lent him during coverture, a very strong case, and the Court were clearly of opinion that the right survived to the wife. This rule applies to all choses in action, whether given before or after marriage, and is not confined, as has been sometimes erroneously supposed, to bonds or notes. *Dalton* v. *Midland Railway Company* (5), is a direct authority for this; there a married woman had bought railway stock, and it was held she could maintain an action for the dividends, subject only to a plea in abatement for the nonjoinder of her husband; on the principle, as the Court say, that "it is settled law that a married woman, though incapable of making a contract, is capable of having a chose in action conferred upon her, which will survive to her on the death of her husband, unless he shall have interfered by doing some act to reduce it into possession." And the Court then proceed to say that the wife, though married, acquired a right to the dividends, as a chose in action, which might, if the husband chose, have been put in suit by the husband and wife, and if not put in suit would have survived to her. This view of the law is adopted in so many words in Williams on Executors, 6th ed., p. 794:—"It may be stated generally, that a married woman, though incapable of making a contract, is capable of having a chose in action conferred on her, which will survive to her on the death of her husband, unless he shall have interfered by doing some act to reduce it into possession." And the law is

(1) 14 East, 582.

(2) 3 H. & C. 193; 33 L. J. (Ex.) 281.

(3) 3 Ex. 136; 18 L. J. (Ex.) 485.

(4) 6 M. & W. 423.

(5) 13 C. B. 474; 22 L. J. (C.P.) 177.

still more fully stated at pp. 792—3:—"Property, falling under the description of choses in action of the wife, are debts owing to her on bond or otherwise, arrears of rent, legacies, trust funds, residuary personal estate, money in the funds, and other property recoverable by action or suit. Marriage is only a qualified gift to the husband of the wife's choses in action, viz., upon condition that he reduce them into possession during its continuance; for if he happen to die before his wife without having reduced such property into possession, she, and not his executors or administrators, will be entitled to it. Accordingly, the general rule of law is that choses in action, which are given to the wife, *either before or after marriage*, survive to her after the death of her husband, provided he has not reduced them into possession; but with this distinction, that as to those which come during the coverture, the husband may, for them, bring an action in his own name; may disagree to the interest of the wife; and that recovering in his own name is equal to reducing them into possession."

[KELLY, C.B. I do not dispute that that is a correct statement of the law, but it does not shew what are choses in action.

CHANNELL, B. At p. 738, Sir E. V. Williams says, "By the term 'chose in action,' as used in this treatise, is to be understood a right to be asserted or property reducible into possession, either by action at law or suit in equity."]

Cases may be cited which are not cases of bonds or promissory notes: *Wills* v. *Nurse* (1); *Ex parte Norton* (2); *Bendix* v. *Wakeman*. (3) In Vin. Ab. Baron & Feme (D. a.) 3, it is laid down that though rent due to husband and wife have accrued due during the coverture, the right to recover the arrears survives to the wife; and *Dembyn* v. *Brown* (4) is to the same effect.

[CLEASBY, B. In Co. Litt. 351. b., it is said, "Marriage is an absolute gift of all chattels personal in possession in her own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them." That includes debts by simple contract, apparently, as opposed to obligation by bond.]

(1) 1 Ad. & E. 65.
(2) 25 L. J. (Bkr.) 43.
(3) 12 M. & W. 97.
(4) Moore, 887.

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The cases cited by the other side are all distinguishable. *Bidgood* v. *Way* (1) has not passed without question: see the notes to the second edition of the reports by Elsley; and all it decided, if anything bearing on the present point, was, that money had and received would not lie at the suit of husband and wife without shewing the wife's interest. That may be said of any action by husband and wife, as was held in *Johnson* v. *Lucas* (2), of an account stated; but the Court were of opinion, on the authority of *Wills* v. *Nurse* (3), that the action would have lain on an account stated concerning money due to the wife. In *King* v. *Basingham* (4) no judgment appears to have been given. In *Carne* v. *Brice* (5), *Tugman* v. *Hopkins* (6), and *Molony* v. *Kennedy* (7), the money or other subject-matter had come into the possession of the wife. The same may be said of *Bird* v. *Peagrum.* (8) And, as pointed out by Blackburn, J., in the judgment in the present case, it must be taken to be consistent with the judgment of some of the same judges in *Dalton* v. *Midland Railway Company* (9), which latter case is a direct authority for the plaintiff.

Prentice, Q.C., in reply. The whole question was assumed in the Court below, viz., that husband and wife could have sued for this money. There is the fallacy: a gift to the wife vests in the husband immediately, though he has not the actual possession: Com. Dig. Baron & Feme (E. 3.). *Holmes* v. *Wood* (10) is a good instance of the distinction as to how far a wife can be said to be the meritorious cause, so as to enable her to be joined in an action. There it was said that in an action for her work and labour, in effecting a cure, she might be joined, but there being a count for medicines supplied, the joinder was held fatal; for the medicines must be the husband's alone. *Messenger* v. *Clark* (11) is also another instance shewing the impossibility of money belonging to a married woman in the contemplation of a court of law.

(1) 2 W. Bl. 1236.
(2) 1 E. & B. 659, 663; 22 L. J. (Q.B.) 174.
(3) 1 A. & E. 65.
(4) 8 Mod. 342.
(5) 7 M. & W. 183.
(6) 4 M. & G. 389.
(7) 10 Sim. 254.
(8) 13 C. B. 639; 22 L. J. (C.P.) 166.
(9) 13 C. B. 474; 22 L. J. (C.P.) 177.
(10) Cited in 2 Wils. at p. 424.
(11) 5 Ex. 388; 19 L. J. (Ex.) 306.

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CLEASBY, B. As there is a difference of opinion among the members of the Court, I have to deliver my opinion first. I am of opinion that the judgment ought to be affirmed. The real question is, whether there was a chose in action of the wife not reduced into possession during the coverture. There can be no doubt as to the general rule of law, but the difficulty is to apply it. Marriage, no doubt, operates as an unqualified gift of all the wife's chattels to her husband; but as to choses in action, it is qualified by the condition that he reduces them into possession during the coverture. This is laid down as recognized law in Com. Dig. Baron & Feme (E. 3); and this applies not only to choses in action given to the wife before marriage but also to those which are created after the marriage, to all if you can properly call them choses in action, to all cases in which the wife is the meritorious cause of action. In Co. Litt. 351. b., to which I have already called attention, it is said: "Marriage is an absolute gift of all chattels personal in possession in her own right, whether the husband survive the wife or no; but if they be in action, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them." That clearly makes no distinction between debts on bond and by simple contract; and there is no reason for saying it makes any distinction between choses in action of the wife before marriage and those which come to her during coverture. It has been held that husband and wife may join in an action on a promise made to the wife after coverture, the cause of action arising from her skill and labour in curing a wound of the plaintiff, and it was said by the Court that such a cause of action survives to the wife: *Brashford* v. *Buckingham* (1); though it was held that the wife could not join in an action on a quantum meruit for her labour, inasmuch as the husband was entitled to the proceeds of his wife's labour, and the promise in law, therefore, if there were not an express promise to the wife, must be to the husband: *Buckley* v. *Collier*. (2) The passage cited from Williams on Executors, pp. 792—3 (6th ed.), is to the same effect; and the language used at the end of the passage is that of Lord Hardwicke, C., in *Garforth* v. *Bradley* (3), who says: "Wherever

(1) Cro. Jac. 77. (2) 1 Salk. 114.

(3) 2 Ves. Sen. at pp. 676–7.

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a chose in action comes to the wife, whether vesting before or after the marriage, if the husband dies in life of the wife, it will survive to the wife; with this distinction, that as to those which come during the coverture, the husband may for them bring the action in his own name, may disagree to the interest of the wife; and that recovery in his own name is equal to reducing into possession." The language of Sir R. Pepper Arden, M.R., in *Langham* v. *Nenny* (1), is precisely to the same effect; and he adds, "By chose in action I mean a right to be asserted by action at law,"—that is, a right to recover something in an action. Apply that to the facts of the present case. There was no right of any sort in the wife to this money; but a person places a sum of money in the hands of the defendant, intending it as a gift to the wife; as soon as the defendant assented to hold this money for the use of the wife and wrote and told her so, it became money had and received to her use; but all she had was a right to recover it from the defendant. If the money had been paid into a bank used by the husband and wife, or if the defendant had been the wife's agent to receive the money, so that the receipt by her would have been the receipt of the wife, that would have been quite a different matter, the money would then have been money received by the wife, and, consequently, absolutely the husband's; but all the wife had here was a bare chose in action, which was never reduced into possession. The wife died; and the husband, for all that appears, knowing nothing of it, took no steps with regard to the money, and he also died. Under these circumstances, I am of opinion that the right to recover the money from the defendant is in the wife's representative.

I cannot undertake to go through all the numerous authorities bearing on the subject; but I can undertake to say that not one of them is at variance with the conclusion at which I have arrived. I will refer to two cases only which have been relied on contra. In *Bird* v. *Peagrum* (2) leasehold property was settled to the separate use of a married woman, she had *received* the rents from the trustee, and had lent part of them to the defendant. That was money which had actually come into the possession of the wife, and it was not a mere chose in action, and it was therefore properly

(1) 3 Ves. at p. 469. (2) 13 C. B. 639; 22 L. J. (C.P.) 166.

held that the husband could sue in his own right for the money. In *Bidgood* v. *Way* (1) the declaration stated that the money was had and received to the use of husband and wife; and as the money must have been received to the use of the husband, the action by husband and wife necessarily fell to the ground. The case is of very doubtful meaning; but this appears to be the ground of the decision, and there is a note by the editor of the 2nd edition (2), citing from *Ord* v. *Fenwick* (3), "Wood, arguendo, observed: That as it was not stated to be the wife's land, the Court could not infer it: besides there was a count for money had and received to the use of husband and wife, and an assumpsit to both." And further on, the editor cites the observation of Dampier, J., in *Philliskirk* v. *Pluckwell* (4): "There must be some little inaccuracy in the case of *Bidgood* v. *Way* in one part, because the Court say that no promise to a married woman, either expressed or implied, gives any interest, and yet they afterwards admit upon the cases, that where a promise is so expressly stated, the husband may assent to give the wife an interest in the contract and join her in the action." The single question after all is, was this merely a chose in action of the wife? I think it was. The defendant received the money to pay over to the wife, and did not do so; it was not reduced into possession during the coverture, and therefore the right of action survived to the wife's representative.

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MONTAGUE SMITH, J. I am of the same opinion. This is not like the case of *Carne* v. *Brice* (5), where the money had come into the possession of the wife, and she afterwards invested it in clothes; nor like the case of *King* v. *Basingham* (6), where the money was lent during coverture. This is the case of a chose in action, such as the husband might have joined her in enforcing, or the husband might have sued alone. But if money comes to the hands of the wife and she afterwards disposes of it, she is not disposing of her own money but her husband's. As to a contract made with the wife before marriage or a benefit lying in contract made to her after marriage, they are choses in action, and are her's,

(1) 2 W. Bl. 1236.
(2) 2 W. Bl. by Elsley, at pp. 1236, 1239.
(3) 3 East, at p. 107.
(4) 2 M. & S. at p. 396.
(5) 7 M. & W. 183.
(6) 8 Mod. 199.

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subject to her husband's right to reduce them into possession during coverture, and become her's absolutely after the death of the husband. Choses in action are not confined to bonds and promissory notes, although they are most frequently given as instances of choses in action, possibly, because at one time it was thought that they passed to the husband absolutely, as chattels. It will be found that in *Gaters* v. *Madeley* (1), Parke, B., refers to a distinction of this sort, where he says, "The only doubt in this case arose from the observations of Lord Ellenborough in *M'Neilage* v. *Holloway* (2), that a promissory note may be treated as a personal chattel in possession. Now, in that respect, I think there was a mistake, and an incorrect expression used. . . . In fact the decision in the subsequent case of *Richards* v. *Richards* (3) has qualified that position. In that case the Court of King's Bench said that a promissory note was, in the ordinary course of things, a chose in action, and that there was nothing to take it out of the common rule that choses in action given to the wife survive to her after the death of her husband, unless he has reduced them into possession." I infer from this, that the established rule was that choses in action, which had not or could not have been brought into possession during coverture, survived to the wife on her husband's death. I have paid attention to all the cases cited, and I can find no case in which, under circumstances like the present, it has been held that an action would not lie at the suit of the wife's representative. I have, therefore, a right to resort to the general rule, and to apply it to the present case, and to hold that as the husband did not reduce into possession the chose in action given to the wife during coverture, her representative is entitled to sustain the action. The facts are very simple. Gardner places money in the hands of the defendant for the use of the wife, and, as the defendant afterwards paid back the money to Gardner, it would appear that it was a mere gift. The wife did not select the defendant as her agent to receive the money, and nothing more appears than that the money was deposited with the defendant by Gardner, and that she wrote to the wife to say she held it to be disposed of as she should direct. What is that but a chose in action given to the wife? The de-

(1) 6 M. & W. at p. 427. (2) 1 B. & A. at p. 221.
(3) 2 B. & Ad. 447.

fendant refused to pay the money, and it can only be got by an action; and if she had refused when both parties were alive an action must have been brought. The case most relied on by the defendant's counsel, *Bird* v. *Peagrum* (1), illustrates this distinction between property reduced into possession and a mere chose in action. There leasehold property was settled to the separate use of a married woman, and while the rents were in the hands of the trustees the husband could not deal with them; but when once the money came into the wife's hands, it became absolutely her husband's, however she might have dealt with it by depositing it with the defendant; and it was therefore held that on her death the husband might sue for it in his own right. In all the other cases money had come into the actual possession of the wife, or at all events the chose in action had been reduced into possession by the wife, or the cases were cases of goods which had been given to or purchased by the wife, and the property vested at once in the husband. A difficulty has been suggested as to the pleadings. Nothing appears on the face of the pleadings as to how or when the money was received to the use of Mary Ann Ross. But it is said that there is a variance, that the evidence does not support the declaration; but I think that the money was received in a certain sense to the use of the wife. As to the case of *Bidgood* v. *Way* (2), the objection arose on a motion in arrest of judgment, and my Brother Cleasby has given the answer to that case,—inasmuch as it was stated in the declaration that the money was received to the use of the husband and wife, and if it was received to their joint use the right would go at once to the husband. It would have been more satisfactory if there had been a count stating the facts; but this is of secondary importance, because the defendant's counsel has maintained that, on the facts, no action would lie at the suit of the plaintiff, as representing the wife, in whatever way the pleadings were framed.

KEATING, J. Having heard only part of the argument, I shall merely say that I agree with the opinion expressed by my Brothers Smith and Cleasby. (3)

(1) 13 C. B. 639; 22 L. J. (C.P.) 166.
(2) 2 W. Bl. 1236.
(3) Willes, J., was present during the argument on the first day, and Keating, J., took his place on the second day.

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CHANNELL, B. I have also come to the conclusion that the judgment of the Queen's Bench ought to be affirmed, but I have not been without some doubt. My Brother Blackburn, in delivering the judgment of the Queen's Bench (1), expresses the opinion "that the facts shew that there was a chose in action conferred on the wife with which the husband did not during coverture interfere." And it is not disputed, that if that were the right conclusion on the facts, the judgment is right. The learned Judge goes on to give the grounds for this conclusion: "The money did not, according to the rule in *Williams* v. *Everett* (2), become the money of the person on whose behalf it was remitted until the depositee had by some act attorned to that person, up to which time it remained the money of the remittor. The money here was remitted for the use of the wife, and of her alone; and the letters of the defendant attorning to the remittee were addressed to the wife alone, and were promises to her to hold the money at her disposal; and there was never anything done to vest either in the husband or wife any property in any coin as a personal chattel, so that it remained a mere chose in action in the wife, with which the husband did not interfere." That involves two propositions. First, that the facts amount to a chose in action only in the wife. Secondly, and that is admitted, that the husband did not interfere. The only question therefore is, was there merely a chose in action conferred upon the wife? I do not intend to go through the cases on the subject; but I wish to state my view of the matter. If a woman join her husband in an action, and the fact of the coverture appear on the record, the cases shew that judgment will be arrested, unless her interest be also disclosed; but under certain circumstances an action may be maintained by husband and wife for a cause of action made to the wife, and if such a chose in action be not reduced into possession during the life of the husband it survives to the wife. What are the facts in the present case? The money appears to have been intended as a gift, but the donee could maintain no action until the defendant had assented to hold the money for her. She did assent, and became liable to somebody; after she wrote the letters the husband and wife might have sued, or, at any rate, the husband might have sued. But still the promise, which is a chose in action,

(1) Law Rep. 3 Q. B. at p. 542. (2) 14 East, 582.

was made to the wife alone. Passages have been cited from Williams on Executors, which directly bear in favour of this proposition; for at p. 738, 6th ed., the very learned author defines chose in action thus: "By the term 'chose in action', as used in this treatise, is to be understood a right to be asserted, or property reducible into possession, either by action at law or suit in equity." Originally no one but Gardner had any right to this money in the hands of the defendant, but on her assent to hold to the use of the wife, it became a chose in action reducible into possession; but as it never was reduced by the husband, at his death it would have survived to the wife, and, consequently, the right may now be asserted by her representatives in an action at law. The difficulty which I have felt, is that which I understand to press upon the Lord Chief Baron, that though some action might have been maintained on the present facts by the husband and wife jointly, yet an action for money had and received would not have lain. Money had and received is a kind of equitable remedy, but there can be no doubt that until the assent was given by the defendant no action would have lain; but she did assent to hold the money for the use of the wife, and as the money has never been paid over and there has been no reduction into possession by action, I do not see why, if some action might have been maintained by the husband and wife jointly, an action for money had and received may not be maintained by the wife's representative, to recover money received by the defendant for the benefit of the wife during coverture, inasmuch as it never was paid over, and consequently at time of action brought was still money held to the use of the wife. I however give my judgment on the simple ground that this was a chose in action given to the wife and never reduced into possession by the husband; and that consequently, on the authority of the passages cited from Williams on Executors, based on the passage in Co. Litt. 351. b., and other authorities, it survived to the wife and her representatives.

KELLY, C.B. I cannot but rejoice that the rest of the Court have been able to come to the decision they have, as there can be no doubt it is in strict accordance with justice; but I am bound, though with reluctance, to affirm that it appears to me to be

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opposed to the first principles of English law, and to amount to deciding, not only that a right of action, but a chattel or money may be the property of a wife. Now the proposition, which lies at the root of all the decided cases, is, that a femme covert cannot be the owner of money, chattels, or any personal property; and this action is for money had and received, which supposes the money to be the property of the wife; and if the present action is maintainable, it must be on the supposition that the wife could have maintained it during coverture, that is that as soon as the defendant had acknowledged that she held the money for the wife the husband and wife might have joined in the action. But nothing, as it seems to me, is clearer than that under no circumstances is an action for money had and received maintainable by husband and wife: *Bidgood* v. *Way* (1), distinctly decides this. The ground, on which it was held that the action was not maintainable by husband and wife in respect of the occupation of the land, was, that it did not appear that the land was the wife's, in other words it did not appear that the wife was the meritorious cause of action; but as to the count for money had and received, it was held simpliciter that the action would not lie. The criticism that has been made on that case is just and correct; there are expressions attributed to the Court which go too far; and there appears to be some inaccuracy in the report. For no doubt what the Court says,—"We are of opinion that this judgment is erroneous, because no contract can be made with a married woman: no promise, either express or implied, gives any interest to her; the whole results to the husband, and the action must be brought in his name only,"—is qualified by what follows, when they admit that the decided cases "shew that in such cases, so expressly stated, the husband may assent to give the wife an interest in the contract, and may join her in the action." But the reason of the decision is contained in the next sentence: "It has been insisted that the Court may intend the estate in question to have been the wife's. But there can be no intendment contrary to the plain meaning of the words. Besides, there are general damages, and the count for money had and received cannot be supported by intendment." That decision is very nearly a century old, and it has never been questioned, and

(1) 2 W. Bl. 1236, 1239-40.

it is cited as an authority by all the text-writers, including Chitty on Pleading, as an authority that action for money had and received is not maintainable by husband and wife. There is no case to be found in the books in which it has ever been held maintainable. The same may be said of money lent and accounts stated. What the Court says in *Bidgood* v. *Way* (1), about intendment, implies that where it can be and is shewn that the contract has been made expressly with the wife, and she is the meritorious cause, the action is maintainable. There are exceptions, as is shewn in Co. Litt. 351. b., and the passages cited from Sir E. V. Williams' Executors, where he points out instances. But they are all cases of peculiar and specific contracts, such as bonds, promissory notes, or other instruments, which on the face of them shew that the contract was made expressly with the wife and in her name; and they are all cases in which there was a contract which did not in itself establish a right to immediate possession, but a right of action, and a right of action only, in which the wife is the meritorious cause, and which is brought on an instrument disclosing her interest. The cases relied upon by the plaintiff's counsel were all cases of this nature. Thus *Wills* v. *Nurse* (2), was the case of a contract which could only be enforced by action. But what is the present case? If the present action can be maintained by the wife's representative, it must be on the supposition that it could have been maintained by the wife in her husband's lifetime, the husband being joined only for conformity. But it is clear the joinder of the wife would have been ground of demurrer or in arrest of judgment: *Bidgood* v. *Way* (3); *King* v. *Basingham* (4); and I again assert, as an undeniable proposition, that no single case can be found in which an action has been maintained by husband and wife in which the interest of the wife did not expressly appear on the face of the record. The present action is for money given to the wife, and the interest of the wife does not appear. I agree that all this is merely technical; but we are not at liberty to set aside first and long established principles. I can only repeat that I rejoice that the judgment of the Court will meet the justice of the case; but I must also repeat that it appears

(1) 2 W. Bl. at p. 1240.
(2) 1 Ad. & E. 65.
(3) 2 W. Bl. 1236.
(4) 8 Mod. 341.

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to me without precedent, deciding, as it does in effect, that husband and wife could jointly maintain an action for money had and received without disclosing the interest of the wife. I shall not offer any opinion as to whether or not action may be maintainable on the facts. That is not the present question.

Judgment affirmed.

Attorney for plaintiff: *C. P. Titt.*
Attorneys for defendant: *Boulton & Sons.*

April 21.
June 5.

GOLDING, APPELLANT; STOCKING, RESPONDENT.
FREESTONE, APPELLANT; CASSWELL, RESPONDENT.

Highway—Highway Act, 1864 (27 & 28 *Vict. c.* 101), *s.* 25—*Cattle lying about a Highway—Right of Pasturage.*

By 27 & 28 Vict. c. 101, s. 25, if any horse, ox, &c., is found straying on or lying about any highway, or across any part, or by the sides thereof, the owner shall be liable to a penalty not exceeding 5*s.* for each animal, provided that nothing in the Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway:—

Held, that the owner of cattle found straying on the metalled part of a highway was liable to a penalty, notwithstanding he had a right of pasturage on the sides of it.

CASE stated by Justices under 20 & 21 Vict. c. 43.

At a petty sessions for the hundred of Wisbeach, in the isle of Ely, an information was preferred by the respondent, a superintendent of police, against the appellant, under s. 25 of the Highway Act, 1864 (27 & 28 Vict. c. 101) (1), charging that the appellant was owner of twenty-five bullocks which were found straying in a certain highway, not being in such part of the highway as passed over any common, or waste or uninclosed ground.

(1) 27 & 28 Vict. c. 101, s. 25:—"Section 74 of the Highway Act, 1835, shall be repealed, and instead thereof be it enacted: If any horse, mare, gelding, bull, ox, cow, heifer, steer, calf, mule, ass, sheep, lamb, goat, kid, or swine is at any time found straying on or lying about any highway, or across any part thereof, or by the sides thereof (except on such parts of any highway as pass over any common, or waste, or uninclosed ground), the owner or owners thereof shall, for every animal so found straying or lying, be liable to a penalty not exceeding 5*s.* . . . Provided, also, that nothing in this Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway."

It was proved that twenty-five bullocks belonging to the appellant, were on a certain day straying on a certain public highway and by the sides of it, nine of such bullocks being upon the central or gravelled part of the highway, and the remainder of them on the sides of it. None of the bullocks were under the control of a keeper at the time they were so found straying upon the highway and the sides of it; and the respondent, who was driving along the highway, in order to avoid driving against one of the bullocks which was standing across the centre of the highway, had to pull his horse on one side of the highway to pass along it.

It was contended, on the part of the appellant, that as he was the occupier of the farm and land on both sides of and adjoining the highway where his twenty-five bullocks were, he had a right, which he and previous occupiers of the same farm and land for fifty years last past had exercised, to the pasturage which existed on the sides of such highway, and that he was in the lawful exercise of such right at the time his bullocks were so found; and the provisions of the Highway Act, 1864, did not extend to take away any such right of pasturage, the same being reserved by the proviso at the end of s. 25.

It was further contended, on the part of the appellant, that at the time his bullocks were found by the respondent on the highway they were under the control of a keeper, who had been sent by him with the bullocks in order that they might depasture on the sides of the highway; and that they could not, therefore, be said to have been found straying on the highway within the meaning of s. 25.

The justices found, as a fact, upon the evidence that nine of the bullocks were seen by the respondent and another person straying upon the central or gravelled part of the highway, as the respondent was driving towards them along the highway, for from five to ten minutes immediately previous to the time the respondent reached the spot where the bullocks were, and that the respondent had to pull on one side of the highway to avoid running against one of the bullocks; and they were of opinion that the appellant was not, as to those of the bullocks which were then upon the central or gravelled part of the highway, legally exercising the right which he had of the pasturage which existed on the sides of the highway.

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The justices also found, as a fact, that the boy under whose control the bullocks were said to be, could not, from the position in which he said he was at the time the bullocks were on the highway, have the control of the bullocks, the boy having deposed, and the justices finding as a fact, that he was at such time in the appellant's field, divided from the highway by a ditch, and forty yards off the nearest of the twenty-five bullocks, where, he deposed, that he had gone to drive some of the bullocks out of the ditches, to prevent their getting into his master's wheat, and that he kept that distance from them in order that they might feed without his disturbing them.

The justices were of opinion, upon all the evidence, that, although the appellant was the occupier of the farm and lands on both sides of the highway, and that his boy or keeper was in the field on the other or contrary side of the ditch dividing the highway from such field for the purposes stated by him, and at a distance not less than forty yards from the nearest of such bullocks, the facts proved before them brought the case within the operation of s. 25; and that the proviso did not extend to exempt the appellant from the penalty; they, therefore, convicted the appellant.

The question of law for the opinion of the Court was, whether the bullocks, or any one of them, were or was straying on the highway within the meaning of s. 25 of the Highway Act, 1864.

Metcalfe, for the appellant. The conviction was wrong; the proviso in s. 25 of 27 & 28 Vict. c. 101, reserves all rights of pasturage; and without this, *Fisher* v. *Prowse* and *Cooper* v. *Walker* (1) shew that a highway may be dedicated subject to a right or obstructions which would otherwise be a legal nuisance. *Lawrence* v. *King* (2) is distinguishable, as there was there no right of pasturage. *Morris* v. *Jefferies* (3) is in favour of the appellant.

[LUSH, J. The justices here find that the cattle were not under the control of the boy.]

The owner cannot be made criminally responsible for the misfeasance of his servant, when the cattle are being depastured in the exercise of a right which is expressly reserved by s. 25.

(1) 2 B. & S. 770; 31 L. J. (Q.B.) 212. (2) Law Rep. 3 Q. B. 345.
(3) Law Rep. 1 Q. B. 261.

[COCKBURN, C.J. The owner of cattle having no right of pasture is liable, if his cattle be found straying or lying on the highway, or by the sides of it; but a person having a right of pasture may turn his cattle on the sides of the highway, and if they are generally kept under proper control, but escape accidentally for a short time, and are found on the gravelled part of the road, that would not be a case for a conviction under the section. But it is a question of fact for the magistrates.]

The proviso overrides the whole section, and must apply as well to the sides as to the road itself.

[LUSH, J. The effect of the proviso is only to protect the owner in the exercise of his right of pasture, so far as the sides of the highway are concerned. He must take care to keep his cattle from straying or lying on the road itself.]

O'Malley, Q.C., for the respondent, was not heard.

COCKBURN, C.J. The conviction must be affirmed. On the facts stated the magistrates might very well have found the other way, but we cannot say they were wrong.

LUSH and HANNEN, JJ., concurred.

Conviction affirmed.

Attorneys for appellant: *Meredith & Lucas.*
Attorneys for respondent: *Wing & Du Cane.*

FREESTONE, APPELLANT; CASSWELL, RESPONDENT.

THIS was a case stated upon a similar conviction by Justices of Lincolnshire.

Upon the hearing it was proved that, on the day named in the information, eight horses and one cow of the appellant were grazing upon a lane called Beacon Lane; the animals were loose, and wandered without restraint all over the road, and about it from one side of the metalled or stone part for an hour and a half, being the whole time the witness remained near the spot, and they were still there when he left; a man with a whip in his hand was lying upon the ground at a distance of twenty or thirty yards from the

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animals, but he did not drive or follow them, but allowed them to roam about at will.

It was admitted on the part of the appellant that Beacon Lane was a highway; but it was suggested that it passed over "waste or uninclosed ground," and that, therefore, animals "straying or lying about it, or on the sides thereof," were removed by this alleged fact from the operation of s. 25 of the Highway Act, 1864; and it was further alleged that the waste or unenclosed ground was the property of the owner of the farm occupied by the appellant; and that this claim of title ousted the jurisdiction of the justices.

The case then set out at length the evidence as to the right of property or pasturage, one of the facts being that there were two gates across the lane, so as to cut off the part of the lane in question from the rest of the lane; and proceeded:—As to title, if to land it was admittedly subject to the highway passing over it. If to herbage, to the same incumbrance or easement in the public. The appellant produced no evidence of any unusual or excessive width of road in support of his suggestion of "waste." . . . The justices, having regard to the appellant's admission of a highway, were of opinion that no such bonâ fide question of title was raised as would oust their jurisdiction; and they were further of opinion that the evidence failed to support the suggestion of "waste or uninclosed land"; and they found as fact that the highway differed in no respect from an ordinary highway; they were of opinion that the case therefore came within none of the exceptions in s. 25; and they accordingly convicted the appellant.

The question for the Court was, whether the conclusion at which the justices arrived to adjudicate was correct.

June 5. (1) *Cave*, for the appellant, argued that a claim of title was raised before the justices, and their jurisdiction was ousted; that the fact of there being gates at each end of the lane where the cattle were shewed it passed over "uninclosed ground;" and that the road was not a highway within the section.

[HAYES, J., referred to *Golding* v. *Stocking*. (2)]

The respondent did not appear.

(1) This case was determined in Trinity Term, but is reported with *Golding* v. *Stocking* for convenience of reference.

(2) Ante, p. 516.

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COCKBURN, C.J. I have no doubt whatever that the conviction was right; but the justices seem to have proceeded on a wrong ground. They seem to have thought that the inquiry might be affected by a question of title; but that is not so. The question simply is, whether the appellant comes within the enactment in the Highway Act. [The Lord Chief Justice read s. 25 of 27 & 28 Vict. c. 101.] The first question to be determined was, is this a highway? The justices have found that it is, and there can be no doubt about it. There are, however, pieces of pasturage land on the sides of the road, and I so far agree with the appellant's counsel that, having a right of pasturage the appellant would be entitled to turn his cattle on these pieces of land; but that right does not entitle him to have his cattle straying on the highway itself which the public use. Here the cattle were not found on the side of the highway, but on the road, and I cannot agree that a man having this right of pasture is entitled not only to have his cattle pasturing on the side of the road, but also straying on the road. That was the very thing the statute was intended to prevent. Secondly, this was not the case of a highway passing over uninclosed ground. Where there is an highway passing over uninclosed land, such as a park, it would be a great hardship on the owner to be prevented from enjoying it by depasturing cattle without incurring the risk of a penalty if the cattle were found on the highway. Here the pieces of land, or greensward, are merely part of the highway. The case, therefore, does not come within the exception of a highway passing over waste, common, or uninclosed ground; nor does the fact of having a right to pasture on the sides of the road entitle the appellant to have his cattle on the road itself. The appellant, therefore, failed to bring himself within the exceptions of s. 25, and was rightly convicted.

MELLOR, J. I am of the same opinion. The object of placing the gates in the lane was only to determine the extent of pasturage which the appellant was entitled to. The proviso prevents the section from taking away any right of pasture which the appellant may have had; but assuming he had a right of pasture, he must exercise his right in the way the statute requires. Formerly he could have exercised it to the inconvenience of the public; but

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the statutes imposed a condition on the exercise of the right of pasture, which is, that he do not allow his cattle to wander on the road itself. I quite agree no question of title could arise in the case.

LUSH, J. I am also of opinion that the justices were right in convicting the appellant, and that the conviction is unaffected by his claim of right. The statute preserves to him the right of pasturage, assuming he had it; but still he is liable to a penalty if his cattle stray on the road. It is said that the fact of there being gates across the road shewed that the road passed over a common or waste or uninclosed ground; but the finding of the justices clearly negatives that. The case also states that the cattle wandered without restraint, and were on the metalled part of the road more than an hour, and the fact of a man being with them makes no difference; s. 25 of the new statute is more stringent than s. 74 of the former Act (5 & 6 Wm. 4, c. 50), the words "without a keeper" being omitted; under the old section, possibly, the appellant could not have been convicted, but the present statute makes the presence of a keeper immaterial if the cattle are found straying on the highway.

HAYES, J. This case is not distinguishable from *Golding* v. *Stocking*. (1) The question is one of fact. No right is taken away from the appellant; but he must exercise his right as the statute directs, and not allow his cattle to stray on the road.

Conviction affirmed.

Attorneys for appellant: *Scott & Co.*

(1) Ante, p. 516.

HARROWER AND OTHERS *v.* HUTCHINSON.

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May 12.

Ship and Shipping—Policy of Marine Insurance—"Port or Ports of Loading"—Concealment—Deviation.

The plaintiffs, in 1861, effected with the defendant a policy of insurance on bone and bone ash on board a certain vessel at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom. The plaintiffs knew, at that time, that the vessel was going from Buenos Ayres to L., a port in the province, to complete her cargo; but this fact was not communicated to the defendant, and he did not know that L. was a port in the province. L. was a place where a trade in hides, bone, and bone ashes was carried on between that place and Buenos Ayres; but vessels could not clear from L. to Europe, but had to return to Buenos Ayres to obtain a clearance. L. was unknown, in 1861, to underwriters as a place of loading; and if underwriters, on a policy as above, had been informed that the vessel was going to load there, they would have required a higher premium than the defendant charged. The vessel went from Buenos Ayres to L., but being unable to get cargo, she left to return to Buenos Ayres, and was lost on her way thither:—

Held, 1. That L. was a port of loading within the policy. 2. That the non-communication that the vessel was going to L. to complete her cargo was not a concealment. 3. That the return of the vessel from L. to Buenos Ayres was not a deviation.

6 QBD 657

Rev'd 5 QB. 388.

SPECIAL CASE stated by consent, after issue joined.

This was an action to recover the sum of 18*l.*, part of a sum of 40*l.*, on a policy of insurance subscribed by the defendant on bone and bone ash per *Matanzas*, lost by perils of the sea.

The declaration stated, amongst other things, that the plaintiffs, by Alexander Kay & Co., their agents, caused to be made a policy of insurance, by which they insured, lost or not lost, at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres to port or ports of call and discharge in the United Kingdom, on bone and bone ash valued at 2000*l.* in the ship *Matanzas*, beginning the adventure in the said goods from the loading thereof on board the said ship as above, including all risk of craft or lighters, and so to continue until arrived as above, and the said goods should be discharged and safely landed; and it was declared to be lawful for the said ship on the said voyage to proceed and sail to and touch and stay at any ports or places whatsoever, without prejudice to the said insurance; and touching the adventures and perils which the assurers took upon themselves in

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that voyage, there were, amongst others, barratry of master and mariners, and all other perils, losses, and misfortunes which had or should come to the detriment or damage of the said goods; and that the defendant subscribed the policy for the insurance of 40*l.* on the said goods in the said ship on the said voyage. That the goods were shipped, and the plaintiffs interested therein, and the ship sailed on the said voyage with the goods on board; and whilst proceeding on the said voyage, and during the continuance of the said risk, the said goods were by the perils insured against wholly lost, and the defendant became liable to pay the 40*l.*, but had not paid it.

The declaration also contained counts for money received by the defendant for the use of the plaintiffs, and for money found to be due on accounts stated.

Pleas as to the first count: 1. That the defendant did not subscribe the policy or become insurer. 2. That the goods were not loaded at Buenos Ayres, nor any port or ports of loading in the province of Buenos Ayres. 3. That the ship did not sail with the goods on board on the insured voyage from Buenos Ayres, or any port or ports of loading in the province of Buenos Ayres. 4. That after commencement of the risk, and before the loss, the ship, without sufficient cause, deviated from the voyage. 5. That the goods were not lost by the perils insured against. 6. That certain material facts, which plaintiffs and their agents knew, but of which the defendant was ignorant, were wrongfully concealed.

To the residue of the declaration: Never indebted.

Issues thereon.

Particulars of the fourth and sixth pleas were delivered, pursuant to a judge's order, as follows:—

The deviation on which the defendant will rely in support of his plea of deviation is that arising from the vessel insured going from Buenos Ayres to Laguna de los Padres, staying at the latter place, and returning to Buenos Ayres, the original port of departure, and staying there.

The concealment on which the defendant will rely in support of the plea of concealment is the concealment of the first of two letters having been received by the plaintiffs, or some of them, or their agents, from Captain Harrower, the master of the said vessel,

and from Barbour, Barclay, & Co., the agents of the said ship, which two letters were dated on or about the 13th of November, 1861, and the concealment of the several facts and statements contained and communicated in the two letters.

1. The plaintiffs were, in 1861, the owners of the British ship *Matanzas*, of 325 tons registered measurement; the plaintiff, Harrower, was the master of the vessel.

2. The plaintiffs, other than Harrower, are in partnership in Glasgow under the style or firm of Gray and Buchanan.

3. In November, 1861, the *Matanzas*, under the command of the plaintiff Harrower, was at Buenos Ayres, on the look out for a cargo for her homeward journey to England. Barbour, Barclay, & Co., of Buenos Ayres, were the agents for the ship and for the plaintiffs.

4. The *Matanzas* took in at Buenos Ayres 245 tons of bone and bone ash; and on the 7th of November, 1861, Barbour & Co. entered into a contract for the sale to the plaintiffs of a cargo of bones and bone ash with Messrs. O'Shaen & Co., the agents in Buenos Ayres of the salader (or slaughter house) of Laguna de los Padres.

5. On the 13th of November, the plaintiff Harrower wrote to the other plaintiffs, Gray and Buchanan, the following letter:—

"Barque *Matanzas*, Buenos Ayres.

"Since I last wrote you we have got clear of all our outward cargo, with the exception of just as much as will stiffen her of coals and iron until we receive on board bones enough, as we have now commenced to load on ship's account, and trust it may turn out well. I will receive as much as will ballast me here, and then proceed down to a place called Laguna de los Padres, which lays in about latitude 38° south, near Cape Corrientes. It is rather open to the E. and N.E., but these winds are not dreaded at this season, and having ground tackle for a ship of 600 tons, I apprehend no danger from all inquiries I have made. I may mention this in case they should claim a heavy premium for insurance; if they should, I would not hesitate to take a small part of the risk myself, but this I will leave to your judgment. I mean the time we are anchored there, and Messrs. Barbour, Barclay, & Co. could keep you informed of our sailing, the passage can be done at a

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cheap rate. You will please to have orders lodged for me at Cork, or rather Queenstown, and, I think Scilly or Falmouth, in case the winds might not enable me to reach Cork. I am not aware if there is any telegraph communication between Scilly and the main land, or not. I expect our cargo will be about 500 tons or thereabouts, 300 to 350 tons ash, and the rest bones, which will be very suitable for the Clyde as far as I can learn. I will write you from that place, I hope, when I complete my loading. We have to give them thirty running days to load, and the bone ash will cost alongside about 2*l.* 5*s.* per ton. I hope by the next mail to be in a forward state."

6. On the same day Barbour & Co. wrote to Gray and Buchanan the following letter from Buenos Ayres:—

"Captain Harrower will advise you by this steamer that he has decided to load bones and bone ash on owners' account, here and at the Laguna de los Padres. Our last would inform you this was one of the courses open to him. He would have preferred to load for Liverpool or London, but the quantity of exportable produce at present on sale is so small, and the season so late, that he was afraid to risk the delay and detention that seemed unavoidable. He was also unwilling to venture on account of his being rather late for the Mantrues. A Liverpool vessel, now in port, went there last year about this time, losing about half the mules and getting only 10*l.* each for the remainder. This inclined him to prefer loading bones and ash here, and the cargo at the Laguno de los Padres, being the only one on sale, we secured it for him. The sellers limit themselves to ship 350 to 400 tons bones and bone ash, and we purpose ballasting him by putting 200 to 250 tons bones and ash on board here. She has now commenced to load, and we hope to send her off in a few days. If the sellers of the ash can procure salt afloat, they purpose giving 100 to 150 tons to take down, for which they will pay him a small freight. For your guidance in arranging the insurance we may mention that the Laguna de los Padres is in latitude 38 south. The place is open to the north-east, but in summer the winds from the quarter are usually moderate. The anchorage is very good, and there are two vessels from 250 to 300 tons trading regularly between it and this place. We are informed that they anchor usually in three and a half fathoms, which seems to indicate that the swell is not so

very heavy. The port may be new to your underwriters, and on this account they may be disposed to ask a rather high premium. If it should be so you might find it suitable only to cover part of the vessel and cargo during her stay there, effecting insurance on the remainder as soon as she sailed; it would be cheaper than from this. In case you should think of this, we will be careful to advise when she sails. You will observe from the copy of contract we enclose, that the ash is to be delivered alongside, so that the risk between the shore and the vessel belongs properly to the sellers. We will do all we can to insure proper weight, &c., and if possible the writer will go down to see the loading properly commenced."

7. These letters arrived at Glasgow, and were received by the plaintiffs Gray and Buchanan, on the 21st of December, 1861.

8. The plaintiffs Gray and Buchanan applied to North, Ewing & Co., brokers, in Liverpool, to effect a policy on the cargo and freight of the *Matanzas*, but owing to the premium required by them the negotiations fell through. (1)

9. The plaintiffs Gray and Buchanan having been informed by James Finlay & Co., of Glasgow and Liverpool, merchants, that they could get the insurance effected, requested them to do so; and J. Finlay & Co. placed the matter in the hands of Alexander Kay & Co., of Glasgow, their brokers, for that purpose.

(1) The correspondence between Gray & Buchanan, and North, Ewing, & Co., was given in the appendix, and was as follows:—

Gray, Buchanan, & Co., to North, Ewing, & Co. "December 24, 1861. At what rates could you insure the hull, cargo, and freight of our barque *Matanzas* at and from Buenos Ayres to Laguna de los Padres, near Cape Corrientes, and thence to a port of call and for discharge in the United Kingdom. Captain Harrower, who is a thoroughly experienced man, has, with our consent, purchased a cargo of bones and bone ash upon ship's account. She is to load sufficient to ballast at Buenos Ayres, and proceed to Laguna de los Padres to finish her loading. We are informed there are vessels of 250 to 300 tons trading regularly between that port and Buenos Ayres, so that there is little, if any, danger more than the direct passage. The captain, who is part owner, writes us that having tackling for a ship of 600 tons, he is willing to run the risk of the port, as there is no danger."

North, Ewing, & Co., to Gray & Buchanan. "December 26, 1861. The rate by the *Matanzas* would be five guineas ship freight, and four guineas cargo."

Gray & Buchanan to North, Ewing, & Co. "December 27, 1861. We have your letter of yesterday. The premium per *Matanzas* we think high, and will do nothing till beginning of next month."

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10. Alexander Kay & Co. entered into negotiations with Campbell, Cross, & Co., of Liverpool, brokers. (1)

11. Eventually, A. Kay & Co., as agents of the plaintiffs, effected on the 3rd of January, 1862, through Campbell, Cross, & Co., a policy on the cargo, which is the policy sued on, and was in the terms stated in the declaration. This policy was subscribed by the defendant on the day of the date thereof for the sum of 40*l*., and the interest of the plaintiffs in the cargo shipped is admitted by the defendant.

12. The above letters of November 13, 1861, were not, nor was the fact that the vessel was to load at Laguna de los Padres, nor that it was known to the plaintiffs at what port the vessel was going to load, communicated to Campbell & Co., or to the defendant. And Campbell & Co. and the defendant were, until some time after the effecting of the policy, ignorant of the letters having been written, and also of the other facts referred to in this paragraph.

13. At the time the policy was effected, the premium charged by the underwriters on the policy in question was at the rate usually charged by them at that time for insurances on bones and bone ash from Buenos Ayres direct to the United Kingdom.

14. Laguna de los Padres was in 1861 unknown to underwriters as a place of loading, and if underwriters on a policy like the policy sued on had been informed that the vessel was going to load there, they would have required a higher premium than that charged for the insurance in question.

(1) The correspondence between A. Kay & Co. and Campbell, Cross, & Co., was set out in the appendix. The proposal was for a policy "at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres to port or ports of call and discharge in the United Kingdom;" and the correspondence was in no way material, beyond shewing the negative facts mentioned in par. 12. A further correspondence, which took place after the loss, between A. Kay & Co. and Campbell, Cross, & Co., was also set out. In a letter of the 16th of July, 1862, in answer to a query by Campbell, Cross, & Co., "whether the port Laguna de los Padres was mentioned at all as the port of loading," Kay & Co. wrote:—"Mr. Muir, of Messrs. James, Finlay, & Co., we are sure, did name to us Laguna de los Padres as the probable port of loading, but never having heard of that place before, and being assured by Mr. Muir that it was in the province of Buenos Ayres, we suggested, in case of mistake, to word the policy in as general terms as possible, and hence, in giving the order for insurance, we said, Buenos Ayres and port or ports in the province of Buenos Ayres."

15. In the beginning of December, 1861, the *Matanzas* being ready to sail to Laguna de los Padres, the plaintiff Harrower applied to the Argentine Customs, the proper officials, for permission to clear and pay the dues at Buenos Ayres, for his cargo on board, and to be shipped at Laguna, that the vessel might sail straight to England from Laguna de los Padres. This was refused as being against the custom and laws of the country, as vessels sailing outwards from Laguna de los Padres are by the local law compelled to return to Buenos Ayres to clear.

16. Numerous and influential applications were made by Barbour & Co., and at their request, to the Argentine Government officials for this permission, but the only concession that could be obtained was that the vessel might sail to Laguna de los Padres, without clearing, upon sureties giving bond to Government for her return from that place to Buenos Ayres to clear and pay dues, and also that no other than the specified cargo should be taken on board. The underwriters were not acquainted with the laws and regulations of the customs at Buenos Ayres, nor were they aware when the policy was effected of the difficulties in which the ship was placed in respect to her clearance.

17. On the 13th of December, 1861, a bond was accordingly given in that behalf by Lamez Brothers on behalf of the owners and plaintiffs.

19. These formalities having been duly completed, the *Matanzas* sailed from Buenos Ayres to Laguna de los Padres, intending to return from thence to Buenos Ayres, and to proceed to England, and she arrived at Laguna de los Padres on the 18th of December.

20. Laguna de los Padres is situate on the coast and in the province of Buenos Ayres in about latitude 38° south, near to Cape Corrientes. There is no artificial port or mote, but merely a "salader" (a slaughter-house), and a wooden jetty, or pier. There is a small village occupied by the people at work at the salader, and others. The place is rather open to the east and north-east. The roadstead is protected by natural headlands on either side, which form a kind of bay. Vessels calling there have to anchor about a quarter of a mile from the shore in the roadstead, and load and unload by means of lighters and small craft belonging to the saladers and others in the place, which ply between the vessels

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and the jetty. There is a resident government magistrate at Laguna. The chief exports of the place are hides and bones and bone ashes. There is a regular trade between Buenos Ayres and Laguna de los Padres, but not between the latter place and Europe.

21. The *Matanzas* lay in Laguna de los Padres for twenty-six days, during which time she took in eighty bags, or sixteen tons, of bone ash only. (1) A difference having arisen between the proprietors of the salader, or slaughter-house, and the plaintiff Harrower as to the cargo and contract, a sum of 160*l.* was paid by the former to the latter in lieu of the contract being completed.

22. On the 15th of January, 1862, the *Matanzas* sailed from Laguna de los Padres for Buenos Ayres in pursuance of the bond and legal obligation imposed by the Argentine custom laws, and to complete her cargo for England.

23. On the 16th of January, 1862, the *Matanzas* was wrecked off Cape San Antonio in the open seas on her way to Buenos Ayres. The cargo on board, viz. 261 tons 15 cwt., was totally lost. (2)

27. The plaintiffs Gray and Buchanan were at once advised of the loss, and at their request A. Kay & Co. notified the same to the underwriters' brokers, Campbell & Co.

The Court was to be at liberty to draw inferences of fact.

The question for the opinion of the Court was, whether the plain-

(1) A letter written to Gray & Buchanan from the master, dated "Roadstead of Laguna de los Padres, January 5, 1862, was given in the appendix, which, after describing what had happened to the vessel in getting to the roadstead, adds: "It is a most abominable place, for we carried away the stock of our spare anchor, which we had to use also after we lost the one upon a foul bottom. And I regret very much to say we have not taken in a pound of cargo since we have been here; yet, in fact, there has only been one working day with the shore since our arrival, and that was fully occupied by the other vessel that was here, and now she is finished loading, and unless the weather gets more favourable it is hard to say when we will get away from this place. It has been a bad undertaking, to say the least of it, and very ill advised. I have only been on shore three times since I have been here, for she very often gets swamped in the surf. No doubt Barbour, Barclay, & Co., will inform you of the quantity of bones and bone ash we have on board when we left Buenos Ayres, which was 90 tons of ash, and 155 tons of bones, making 245 tons."

(2) The loss of the vessel was communicated by the master, Harrower, to Gray & Buchanan in a letter dated the 19th of January, 1862, which was given in the appendix, but is unnecessary to set out.

tiffs are entitled to recover against the defendant on the policy sued on.

Milward, Q.C. (*Baylis* with him), for the plaintiffs. The first question is whether Laguna de los Padres is a port within the meaning of the policy. Now the words of the policy are, "at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres." The vessel being partly loaded at Buenos Ayres, proceeded to Laguna de los Padres, to complete her loading, and she was at liberty to go from port to port for this purpose. Laguna de los Padres was a place of export of hides, bones, and bone ashes, and a regular trade was carried on between that place and Buenos Ayres, by means of vessels averaging from 250 to 300 tons burden; to constitute the place a port, it is not necessary that vessels shall clear there for Europe; it is enough if vessels go there for the purposes of trade. Geographically, the place is a port, and there is no authority for saying that if a place is a port geographically, it is not a port of loading within the meaning of a policy. In *Cockey* v. *Atkinson* (1), an open roadstead being a place of loading was held to be a port. Port means any place where the ship is intended to load or discharge: *Brown* v. *Tierney* (2); *Jarman* v. *Coape* (3); *Sea Insurance Company of Scotland* v. *Gavin*. (4) If Laguna de los Padres is a port of loading, then the plaintiffs had a right to go there, and there was no deviation. Neither is the voyage back to Buenos Ayres a deviation; had the vessel completed her loading at Laguna de los Padres, she was bound to sail for her port of discharge, but having failed in this, she was entitled to return to Buenos Ayres.

Cohen, for the defendant. First, there was a concealment of a material fact which vitiates the policy. The letters of the 13th of November ought to have been communicated to the defendant. Those letters shew that Laguna de los Padres was a new port, and that the master anticipated that the underwriters would ask a higher premium than that paid from Buenos Ayres to England. The letter of the 24th of December (5) shews that the insurance originally in-

(1) 2 B. & A. 460.
(2) 1 Taunt. 517.
(3) 2 Camp. 613.
(4) 2 Dow & Cl. 129.
(5) See p. 527, n.

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tended to be effected was on a voyage at and from Buenos Ayres to Laguna de los Padres, and thence to a port in the United Kingdom. Had the underwriter seen these letters, the impression on his mind would have been, that the vessel was, to a certainty, going to Laguna de los Padres, to load, and it appears from paragraph 14, that that place was unknown in 1861 to underwriters as a place of loading. The premium on that risk would have been double the premium at which the insurance was effected by the defendant. But the non-communication of those letters produced the impression on the mind of the underwriter, that the assured did not know to what particular port the vessel was going for her cargo. It is clear, therefore, that there was a concealment from the underwriter; the only question is, whether it was a concealment of a material fact. Concealment is defined in 1 Arnould on Marine Insurance, by Maclachlan, p. 520, to be the "suppression of a material fact within the knowledge of the assured, which the underwriter has not the means of knowing, or is not presumed to know. A material fact in this connection is one which, if communicated to the underwriter, would induce him either to refuse the insurance altogether, or not to effect it except at a higher premium." Duer on Insurance, vol. 2, p. 382, also lays it down, "The question is not whether the loss that is claimed is attributable in any degree to the risks that were concealed; but whether, had the facts been known, the underwriter would have subscribed the policy, or would have limited himself to the premium that he received." The concealment clearly was of a material fact, as it appears that North, Ewing, & Co., required a premium twice as high as that paid to the defendant. (1) In every case of insurance there is an implied warranty that there is no concealment of facts: *Proudfoot* v. *Montefiore* (2); *Bates* v. *Hewitt*. (3) Here the plaintiffs knew that the vessel was going to load at Laguna, and they concealed that fact. *Middlewood* v. *Blakes* (4), is in point; there an insurance was effected on a ship from London to Jamaica, but the fact that the vessel was going to touch at St. Domingo was not communicated to the underwriter, and it was held that the policy was void. The case is exactly like an insurance of goods on ship, or ships; if the assured knows the name of the ship on which the

(1) See letter, Dec. 26, p. 527, n.
(2) Law Rep. 2 Q. B. 511.
(3) Law Rep. 2 Q. B. 595.
(4) 7 T. R. 162.

goods are, and does not disclose it, the policy is void: *Lynch* v. *Hamilton*. (1) So the fact of a vessel having been aground is material to the risk, and its non-communication to the underwriter avoids the risk: *Russell* v. *Thornton* (2); or if the assured knows that the ship is to sail with convoy, and does not communicate the fact, the policy is vitiated: *Bridges* v. *Hunter*. (3) If in these cases the information had been communicated, it would have led to further inquiries on the part of the underwriter. See also Duer, vol. 2, p. 403. Here the fact concealed is, that the vessel was going to load at Laguna de los Padres; if that fact had been communicated, the underwriter would have made inquiries, and learnt that it was a new place and replete with dangers. Besides, the plaintiffs ought to have informed the defendant that the vessel was going to that port, for it might be that the defendant was under the impression that she might or might not go there; assuming he knew Laguna de los Padres to be a port in the province of Buenos Ayres, he might have calculated the rate of premium on the chances of her not going there, whereas had he known to a certainty she was to load there he would have required a higher rate.

Secondly, the voyage back to Buenos Ayres from Laguna de los Padres vitiated the policy. There are no words in the policy to cover this risk, and it was a deviation from the voyage. The intention of the policy is that the vessel, after leaving Buenos Ayres, should proceed from port to port in that province to complete her cargo in regular succession, and then depart for her port of discharge; but it does not cover the risk of sailing backwards and forwards until she is fully laden. Further, if Laguna de los Padres is not a port within the meaning of the policy, she would have no right to go there, and that would also be a deviation.

The last point is that Laguna de los Padres is not a port within the meaning of this policy. It is not enough that the place is geographically a port, this place is not a port from which a ship can clear on a voyage to a port of discharge in the United Kingdom; the policy does not attach on a voyage from a port of loading where there is no custom-house, and it was not the intention of the

(1) 3 Taunt. 37.
(2) 4 H. & N. 788; 29 L. J. (Ex.) 9; in error, 6 H. & N. 140; 30 L. J. (Ex.) 69.
(3) 1 M. & S. 15.

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underwriter that the vessel was to load at a port from which she was to return to Buenos Ayres to get her clearance; the risk insured is from Buenos Ayres to port or ports within the province, and does not include a risk on a voyage back to Buenos Ayres; neither does it include any new port unknown to the underwriter. It is a principle which runs through the whole law of marine insurance, that general words only include things that are usual; for instance, "goods" does not include goods stowed on deck, unless it is usual and customary to carry goods on deck on the voyage. "Port," therefore, does not include a new port. The underwriter is presumed to know what is usual, but not bound to know the character of a new port.

Baylis, in reply, on the first point cited *Foley* v. *Tabor* (1); and on the second *Ashley* v. *Pratt*. (2)

LUSH, J. I am of opinion that our judgment should be for the plaintiffs. The policy was effected on goods "at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres to port or ports of call and discharge in the United Kingdom." The first question is whether Laguna de los Padres, to which the vessel went for the purpose of taking in her cargo, and where she did take in part of her cargo, was a port of loading within the meaning of the policy; if it was not, the underwriters are absolved from all risk.

The words "port or ports of loading," I think must be read in a liberal sense; they must be taken to mean not merely those places which are technically called ports, but all places to which ships may be accustomed to resort for the purpose of taking in cargo. Mr. Cohen's contention is, inasmuch as the policy contemplated that the vessel should go direct from the port of loading to a port of discharge in the United Kingdom, and as by the regulations of the province, a vessel taking in a cargo at Laguna de los Padres, must have returned to Buenos Ayres in order to get a clearance, that on that account that place cannot be a port of loading within the meaning of the policy. I do not think that argument is well founded. The question, whether Laguna de los Padres is a port within the meaning of this policy, does not depend on whether

(1) 2 F. & F. 663. (2) 16 M. & W. 471; in error, 1 Ex. 257.

by the regulations of the province a vessel could come direct from thence to this country; it must depend on other considerations. Now, Laguna de los Padres is described (in par. 20) as being a place situate on the coast of Buenos Ayres near to Cape Corrientes. Vessels calling there have to anchor about a quarter of a mile from the shore in the roadstead, and load and unload by means of lighters and small craft belonging to the saladers and others in the place, which ply between the vessels and the jetty. The chief exports of the place are hides and bone and bone ashes. There is a regular trade between Buenos Ayres and Laguna de los Padres, but not between the latter place and Europe. And it is further stated (in the letter in par. 6) that the anchorage is very good, and that vessels of from 250 to 300 tons burden regularly trade between it and Buenos Ayres. Therefore it appears to have been a place from whence merchandize of the description mentioned was regularly exported, and to which vessels of the tonnage of this ship would regularly go for trade. It must, consequently, be taken to have been a place within the contemplation of the parties, a port of loading to which this vessel was at liberty to go under this policy.

The vessel having at Buenos Ayres taken in a sufficient part of her cargo as ballast went to Laguna de los Padres, with the intention on the part of the owners of there completing the loading of her entire cargo. However when she got there it was found that she could not get a complete cargo, but could only get a portion. The master having received compensation for the breach of contract the vessel returned to Buenos Ayres to complete her cargo, and in the course of the return voyage she was lost. It is contended that the vessel deviated from her voyage when she went back to Buenos Ayres to complete her cargo. I do not think that argument is well founded. I think the liberty to go to "a port or ports of loading" gave the captain permission to go from port to port,—whether back to the same place or not is immaterial,—until he had completed his cargo. If the vessel had once started on the homeward voyage, no doubt a return to Buenos Ayres would have been a deviation. Not having done so, I think the vessel was on the voyage insured at the time the loss happened.

The next contention is, that the plaintiffs were guilty of conceal-

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ment of a material fact in not having informed the underwriters that the vessel was destined to go to this particular place to take in her cargo. It is stated in the case (par. 14), that Laguna de los Padres was, in 1861, unknown to underwriters as a port of loading, and that if the underwriters had been informed the vessel was going to load there, they would have required a higher premium. It was argued that this was a material fact not communicated to the underwriters, and that the policy is void on account of that concealment. I dismiss the argument as to the fact being material, by saying that any matter is material which would induce the underwriter to charge a higher rate of insurance. Then, is it a matter that the assured is bound to disclose, or the underwriter to find out for himself? A concealment is the suppression of a material fact within the knowledge of the assured, which the underwriter has not the means of knowing; and Lord Mansfield, in *Carter* v. *Boehm* (1), says, "that the assured need not mention what the underwriter ought to know; or what he takes on himself the knowledge of." He is bound to know the nature of the voyage he has undertaken to insure, the geographical character and formation of the loading places where the vessel is to go, and all the perils arising from natural causes which appertain to the navigation. I therefore think that the underwriter cannot excuse himself on the ground that he was not aware that Laguna de los Padres was a port of loading, because by the terms of the policy he had undertaken to include it in his insurance. Nor can he excuse himself on the ground that he was not aware of the peculiar perils attending the navigation from Buenos Ayres to that place. That is a matter which the underwriter took on himself to know, and which the assured was not under any obligation to disclose to him. There being, therefore, no obligation on the assured to give the information, and no question having been asked by the underwriter of the assured, we think there was no concealment of any fact which it was incumbent on the assured to disclose voluntarily to the underwriter.

Then Mr. Cohen contended that, supposing the underwriter had known that Laguna de los Padres was a port of loading, and its perils, still he was entitled to know that the assured intended, at the time the policy was effected, to send his vessel to that port;

(1) 3 Bur. at p. 1910.

because, when the underwriter authorized the vessel to go to any port or ports of loading in the province of Buenos Ayres, he might have calculated his premium on the chances that the vessel might not go to this particular port; and thinking the chances were that the vessel would not go to Laguna de los Padres, he accepted the risk at a smaller premium than he would have done if he had known to a certainty that the assured had made up his mind to send the vessel to Laguna de los Padres amongst other ports. In support of this contention, the case of *Middlewood* v. *Blakes* (1) was cited. There a ship was insured from London to Jamaica, and in the course of the voyage there were three tracks which a ship bound on that voyage might take, and it depended on the discretion of the master, governed by the state of the weather, which of those three courses he would take. But in that particular case the assured had already given directions to the master to touch at St. Domingo, so that the discretion which the underwriter supposed the master would exercise was entirely taken away, for he was bound to go to St. Domingo. He had gone beyond the dividing point at the time the accident happened; and the Court decided on grounds, intelligible enough, that that was a deviation; that whereas the voyage contemplated was a voyage which, after reaching a given point, should branch off to the right or to the left, according as the exigencies of the navigation required, this was a voyage not of that nature at all, inasmuch as the master was deprived of the discretion which the underwriters supposed he would exercise for their benefit. That case, therefore, has no application whatever to the present. There is no deviation here from the voyage insured, assuming that I am right in saying that Laguna de los Padres was one of the ports to which the underwriter authorized the assured to go, and whether he had determined to go there before or after the policy was made is immaterial.

For these reasons I am of opinion that the defence entirely fails, and that the plaintiffs are entitled to our judgment.

HANNEN, J. I am of the same opinion. I have nothing substantial to add to the reasons given by my Brother Lush. I think it is not necessary to communicate to the underwriter those things, which he must be presumed to know, and which must have reference

(1) 7 T. R. 162.

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to the particular insurance. I think that when an underwriter undertakes to insure at and from a port or ports of loading in the province of Buenos Ayres in words as large as these, he must be presumed to know that along the coast of a whole province there may be ports of which he has no knowledge, and as to which there may be particular risks. That being so, if he does not intend to limit the places by the words he uses, it is his duty to make inquiry. If he accepts a risk in such words as these, the person who contracts with him has a right to presume that he knows the character of the coast, and possibly of there being some parts of it of which he has no special or even general knowledge. It was not, therefore, necessary that the plaintiffs should communicate anything more than they did. Upon the the other questions I agree with my Brother Lush that our judgment should be for the plaintiffs.

HAYES, J. I have had considerable doubt during some part of the argument. It struck me very much, when the name of this place was given, and stated to be a new place, not known to underwriters, that the omission to communicate that was a matter of some moment, and not altogether to be lost sight of; but I am not disposed to differ with the rest of the Court that our judgment should be for the plaintiffs. The underwriter has taken on himself the risk that the assured might go to this place. I cannot help thinking that gentlemen in the position of underwriters must be taken to know something of the character of the places mentioned to them, and that we should be introducing a new sort of peril into cases of this description if we were to sanction the notion that an underwriter is to be called upon by the assured to state what is his knowledge of the particular places mentioned in the policy. On the whole, I am of opinion that the more reasonable conclusion is that propounded by my Brother Lush, and that our judgment should be for the plaintiffs.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Gregory & Rowcliffes.*
Attorneys for defendant: *Field, Roscoe, & Co.*

END OF EASTER TERM.

CASES

DETERMINED BY THE

COURT OF QUEEN'S BENCH

AND BY THE

COURT OF EXCHEQUER CHAMBER

ON ERROR AND APPEAL FROM THE COURT OF QUEEN'S BENCH,

IN AND AFTER

TRINITY TERM, XXXII VICTORIA.

ZUNZ *v.* THE SOUTH EASTERN RAILWAY COMPANY.

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May 22.

Railway Company—Carrier—Passenger's Luggage—Conditions limiting Liability of Carrier—Railway and Canal Traffic Act, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2 *and* 7.

The plaintiff took a ticket of the South Eastern Railway Company, to be conveyed as a passenger from London to Paris, on which was printed, "The South Eastern Railway Company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Railway Company's trains or boats. . . ." The plaintiff did not sign this memorandum. The plaintiff's portmanteau was lost between Calais and Paris on a French railway:—

Held, that the Railway and Canal Traffic Act, 1854, only extends to the traffic on a company's own lines, and s. 7 does not apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company; and that the company were therefore protected by the condition on the ticket.

THE first count of the declaration stated, that in consideration that the plaintiff would deliver to the defendants, as carriers of goods for him, certain goods of the plaintiff, to be by the defend-

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ants safely carried from London to Paris, and there delivered to the plaintiff for reward to the defendants in that behalf, the defendants promised the plaintiff that they would safely convey the goods from London to Paris, and deliver the same to the plaintiff, and the plaintiff delivered the goods to the defendants, and the defendants received the same for the purpose and on the terms agreed; that all conditions were performed to entitle the plaintiff to have the goods safely carried from London to Paris, and there delivered to him, yet the defendants did not safely carry the goods from London to Paris, and there deliver the same.

Second count, that in consideration that the plaintiff would deliver to the defendants as carriers of goods for hire certain goods of the plaintiff, to be by them safely carried from London to Paris, and there delivered to the plaintiff for reward to the defendants, the defendants promised the plaintiff that they would deliver the same to the plaintiff in Paris, and the plaintiff delivered the goods to the defendants, and the defendants received the same for the purpose and in the terms aforesaid; and all conditions happened to entitle the plaintiff to have the goods delivered to him in Paris, yet the defendants did not deliver the same to the plaintiff, alleging special damage.

Plea, inter alia, 5, that the promises respectively were made and the goods respectively were delivered by the plaintiff to the defendants, and were received by them to be carried as aforesaid under special contracts between the plaintiff and the defendants, and subject to certain just and reasonable conditions contained in the contracts respectively, and set out in the through tickets respectively taken by the plaintiff from the defendants, one of which conditions in each case was that the defendants would not be responsible for loss or detention of or injury to the luggage of the plaintiff travelling by the said through tickets, except where the plaintiff should be travelling by the defendants' trains or boats, and in the latter case only when the plaintiff should comply with the bye-laws and regulations of the defendants, and in no case for luggage of greater value than 6*l.*; and that the losses and breaches in the declaration alleged were respectively losses which did not occur while the plaintiff was travelling by the defendants' trains or boats within the meaning of the conditions.

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Issue was taken on the plea.

At the trial before Cockburn, C.J., at the sittings in London after Hilary Term, 1868, it appeared that the plaintiff took a first class through ticket from the Charing Cross Station of the defendants to Paris. The ticket was in three coupons:—1. From London to Dover. 2. From Dover to Calais. 3. From Calais to Paris. On the ticket was printed the following conditions: "The South Eastern Railway Company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Railway Company's trains and boats; and in this latter case only when the passenger complies with the bye-laws and regulations of the company; and in no case for luggage of greater value than 6*l.* The South Eastern Railway Company incurs no responsibility of any kind beyond what arises in connection with its own trains and boats, in consequence of passengers being 'booked' to travel over the railways of other companies, such through booking being only for the convenience of the passenger. Nor will the South Eastern Company be responsible for the trains and boats, whether of this or the other companies over whose lines this ticket extends, being delayed or not meeting the trains shewn in correspondence; nor for any consequences that may result to a passenger thereby."

The plaintiff's luggage consisted of a portmanteau, which being in excess of the weight allowed a first-class passenger, the plaintiff paid to the defendants 3*s.* for the excess. The portmanteau was registered through to Paris. It was lost on the Great Northern of France Railway, on the journey between Calais and Paris.

The jury found a verdict for the plaintiff for 93*l.* 14*s.* 6*d.*, leave being reserved to enter a verdict for the defendants.

A rule was accordingly obtained, on the ground that the company was not responsible for loss in France.

H. James, *Baker Greene*, and *Macrae Moir*, shewed cause. If the special contract contained in the ticket delivered to the plaintiff is binding on him, the defendants are not liable for the loss of the plaintiff's luggage; but that contract to be binding on the plaintiff, ought to have been signed by him as provided by the Railway and

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Canal Traffic Act, 1854. (1) It has not been so signed, therefore the defendants are liable for the loss. It would seem at first sight from *Stewart* v. *London and North Western Railway Company* (2), that that statute does not apply to contracts made with reference to passengers' luggage. But the language of s. 7 is, the company shall be liable for the loss of "goods and things," unless, &c., "things" would include passengers' luggage; although there is no definition of goods in the interpretation clause, that clause (s. 1) provides that "traffic shall include not only passengers and their luggage . . . conveyed by any railway . . . but also carriages, &c." clearly shewing that the legislature intended the statute to apply to passengers' luggage as well as to goods.

[COCKBURN, C.J. The difficulty is that the Railway and Canal Traffic Act, 1854, is confined to a company receiving, forwarding, and delivering goods on its own lines, and it is only in that case that a contract limiting their liability is to be signed by the party sending the goods.]

It has never been so held. In *Aldridge* v. *Great Western Railway Company* (3), one question raised was, whether a condition

(1) 17 & 18 Vict. c. 31, s. 2: "Every railway company, canal company, and railway and canal company, shall, according to their respective powers, afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively, . . ."

S. 7: "Every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition, or declaration made and given by such company contrary thereto, or in anywise limiting such liability, every such notice, condition, or declaration being hereby declared to be null and void: Provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods, or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried, to be just and reasonable . . . Provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods, or things as aforesaid shall be binding upon or affect any such party unless the same be signed by him or by the person delivering such animals, articles, goods, or things respectively for carriage."

(2) 3 H. & C. 135; 33 L.J. (Ex.) 199 (2)

(3) 15 C. B. (N. S.) 582; 33 L. J. (C. P.) 161.

(2) 5 C.B. 10 Jun. No. 805

that the defendants' responsibility should cease when the goods should have been handed over to another carrier, was a reasonable condition under the Railway and Canal Traffic Act, 1854, but it never occurred to either counsel or the Court that the statute did not apply to contracts beyond the company's own line. Such a construction would render the statute almost nugatory; one of its objects being to facilitate the use of railways as a continuous line of communication. [They also argued that the contract was an entire contract by the defendants to carry to Paris, citing *Muschamp* v. *Lancaster and Preston Junction Railway Company* (1); *Great Western Railway Company* v. *Blake* (2); but on this point the Court gave no judgment.]

Field, *Q.C.*, and *F. M. White*, in support of the rule. The defendants are not bound at common law to carry beyond their own line, and the condition is reasonable: *Aldridge* v. *Great Western Railway Company* (3); *Bristol and Exeter Railway Company* v. *Collins*. (4) Further, the contract is divisible, and can be treated as two contracts: *Baxendale* v. *Great Eastern Railway Company*. (5) The Railway and Canal Traffic Act, 1854, does not apply for two reasons: First. It has no application to passengers' luggage: *Stewart* v. *London and North Western Railway Company* (6); and secondly, it applies only to the receiving, forwarding, and delivering of traffic by a company on its own line, and not to traffic carried on railways over which the company has no control. The special contract is therefore a protection to the defendants, although it was not signed by the plaintiff.

COCKBURN, C.J. I think it is unnecessary to decide the first question, namely, whether the contract with the company was a contract binding them to carry the plaintiff and his luggage for the entire journey from London to Paris. I am strongly disposed to think that it is such a contract. It is not a contract limited to carry on the defendants' own line: it is not a contract made between the plaintiff and the defendants to carry to the extent of their line,

(1) 8 M. & W. 421.
(2) 7 H. & N. 987; 31 L. J. (Ex.) 346.
(3) 15 C. B. (N.S.) 582; 33 L. J. (C.P.) 161.
(4) 7 H. L. C. 194; 29 L. J. (Ex.) 41.
(5) Ante, p. 244.
(6) 3 H. & C. 135; 33 L. J. (Ex.) 199.

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in their own behalf, and with the other two companies as regards the sea passage and the land journey through France, as agents for the other two companies. I am strongly disposed to think that it is a contract whereby the South Eastern Railway Company contract to convey the plaintiff to the end of their own line and then contract that he shall be conveyed by the other two companies from Dover to Calais, and again from Calais to Paris: but it is not necessary to determine that question.

25 L.D. 477
10 QBD 181

However harsh it may appear in practice to hold a man liable by the terms and conditions which may be inserted in some small print upon the ticket, which he only gets at the last moment after he has paid his money, and when nine times out of ten he is hustled out of the place at which he stands to get his ticket by the next comer,—however hard it may appear that a man shall be bound by conditions which he receives in such a manner, and moreover when he believes that he has made a contract binding upon the company to take him, subject to the ordinary conditions of the general contract, to the place to which he desires to be conveyed,—still we are bound on the authorities to hold, that when a man takes a ticket with conditions on it he must be presumed to know the contents of it, and must be bound by them.

Looking to the terms of that ticket nothing can be plainer than this, that the company,—whether they are contracting for themselves, or whether they are contracting for themselves and also for the two other companies whose aid is required to complete the conveyance,—have placed upon that contract a clear restriction, and by that restriction they stipulate they will not be responsible for loss of or injury to passengers' luggage, except while the passenger is travelling by their own train or boat; therefore, unless there is something in law to prevent the defendants from annexing that condition to the contract which they have entered into with the plaintiff, the plaintiff is out of court; for it is an undoubted fact that the loss in respect of which he brings the action was a loss occasioned, not by the default or negligence of the defendants or their servants, but by the negligence of the servants of the Great Northern of France Railway.

By the general law there is nothing to prevent railway carriers from putting such a limitation as this upon a contract into which

they enter to convey beyond the extent of their own line; and the only ground upon which it can be said that they are prevented from putting such a restraint upon the contract is, that the Railway and Canal Traffic Act, 1854, prohibits them from so doing. Therefore, the case really becomes narrowed to the simple question whether the Railway and Canal Traffic Act, 1854, applies to such a case as this, and I am very clearly of opinion that it does not. It only applies to a line which the company against whom an action is brought are working for themselves. Section 2, which is the important section, I think indicates the whole scope and intention of the legislature. It enacts, "Every railway company, canal company, and railway and canal company, shall according to their respective powers afford all reasonable facilities for the receiving and forwarding and delivering of traffic upon and from the several railways and canals belonging to or worked by such companies respectively." That being the general purpose of the Act, we come to s. 7, which is the one upon which the plaintiff is obliged to rely, and there we find it said, "That every such company as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle, or other animals, or to any articles, goods, or things, in the receiving, forwarding, or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice and condition or declaration made and given by such company contrary thereto, or in any wise limiting such liability; every such notice, condition, or declaration being hereby declared to be null and void." Now, it is to be observed that the language of s. 7, in speaking of the receiving, forwarding, or delivering of the goods and articles, corresponds exactly with the terms used in s. 2. Looking at the general scope of the statute, limiting its enactments to railways and canals belonging to or worked by the railway or canal companies, it seems to me impossible to say when you come to apply s. 7 that that section is to be carried any further than s. 2. The general provision is that whenever the company is working its own line or any other line which it has obtained power to work, it shall afford all reasonable facilities for the receiving, forwarding, and delivering of traffic; it shall not be a matter of option, it shall not be a matter in which the convenience of the company alone is to be considered. Railway

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companies have acquired vast powers by means of legislative interference, and the legislature has properly put upon them corresponding duties and obligations for the advantage and convenience of the public: because these powers were not intended to operate simply for the companies' own benefit alone, but also to insure a corresponding benefit to the public. Then s. 7 takes the matter up in the same way, and provides that companies shall not, as they have hitherto attempted to do, and in various instances have succeeded in doing, secure to themselves, by notices and by special contracts, immunity in respect of losses, by stipulating that they will not be responsible for the default or negligence of their servants, nor shall they be allowed to introduce any condition limiting their liability as carriers, except such as a court of law shall hold to be reasonable. Surely that means, as in s. 2, where they are acting on their own lines. It never can mean if companies choose to make special contracts with regard to goods carried beyond their own line, or lines which they have acquired powers to run over, that they shall not be at liberty to restrict those contracts by conditions. Duties are imposed upon them by this Act, but those duties are limited to their own lines. If they contract to carry beyond their own lines the whole matter is open and at large. I think it would be very wrong to put a forced and strained construction on these sections. It may be, in the case of English companies who undertake to carry, for instance, from London to the North of Scotland, under one contract, and pass over several railways which do not belong to them, that those companies may impose restrictions on their liability beyond their own line; but if inconvenience and mischief arise from such restrictions, it is for the legislature to interfere.

MELLOR, J. I also think it is not necessary to determine whether or not this is one contract made by the defendants with the plaintiff, to carry him through to Paris, or whether it is a contract by them to carry him to Dover, and a further contract, as agents, that the other companies shall carry him by a sea passage and a land passage to Paris. I think the Railway and Canal Traffic Act, 1854, does not apply to the present case. The defendants propose to carry persons from London to Paris, and they

choose to stipulate that they will not be responsible for the loss of passengers' luggage beyond the limits of their own line, there is nothing unreasonable in that stipulation. Powers are conferred by the legislature on a railway company to make their line and carry goods, and that in a certain sense confers upon them a monopoly. The legislature then have to see that so far as their line extends, and so far as their powers are used, the railway company does not use them to the disadvantage of the public, therefore the legislature says no condition or contract which the company choose to impose with respect to traffic on their own line shall be valid, unless made in a particular form and held by the Court to be reasonable. That seems to be the effect of the Railway and Canal Traffic Act, 1854; which is very properly limited to the extent of the company's own line and powers; it does not impose any liability on them in respect of what happens upon other lines.

I quite agree with my Lord that there, possibly, may be a right to make such a stipulation as the present with reference to a land journey throughout England to Scotland; but I rather think it will be found to be for the convenience of the public and also for the benefit of the railways not to adopt such conditions as those in the present case. However that may be, I am perfectly satisfied the Railway and Canal Traffic Act, 1854, does not apply to this contract, and therefore the defendants are entitled to have the verdict entered for them.

LUSH, J. I am of the same opinion. Assuming this to be such a contract as contended for on the part of the plaintiff, it is subject to the condition that the company will not be responsible for the loss of luggage after it has left the defendants' line. Unless there is something in the Railway and Canal Traffic Act, 1854, that renders that contract invalid, it is binding on the plaintiff; and if he is bound by it, then it is admitted the defendants are entitled to our judgment, because the luggage was lost after it had left the defendants' line. But it is contended that the Railway and Canal Traffic Act, 1854, renders such a contract invalid, either as being within the first part of s. 7, as a void condition, or as not coming within the proviso at the end, not being a contract signed by the plaintiff. That appears to me to be the only question in the case.

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Is it a contract governed by the Railway and Canal Traffic Act, 1854? I am clearly of opinion, and for the reasons already given, that it is not. Section 2 gives power to the Court of Common Pleas to compel railway companies to afford all reasonable facilities for receiving, and forwarding, and delivering traffic upon their own railway, and upon railways which they work; and s. 7 comes in as supplementing that, and says you shall not neutralize the effect of the obligations cast upon you by s. 2, by setting up conditions and restrictions that will have the effect of throwing the risk of the carriage upon the consignor: therefore you shall be liable for the loss or the injury to any goods in receiving or in delivering them, notwithstanding any notice, condition, or declaration made in anywise limiting your liability; and you shall be liable for any injury occasioned by the neglect or default of yourselves, or your servants; and it is provided, at the end of the section: "That no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him, or by the person delivering such animals, articles, goods, or things respectively for carriage." Clearly, to my mind, that refers to the obligation in the 2nd section, and s. 7 says, in effect, you shall not, by any notice, limit the liability we have cast upon you, as carriers, for the carriage of goods upon your own line, though you may make a special contract, if the other party signs it, and if its conditions are reasonable. The question of reasonableness does not arise here, because the judgment I have come to is, that the present case is not within the statute, which only applies to the carriage of goods upon a company's own line, and leaves them at liberty to make any contracts they please for limiting their liability on lines not their own.

HAYES, J. I entirely concur in the judgment of the rest of the Court, and for the reasons that have been given.

Judgment for the defendants.

Attorneys for plaintiff: *Kimber & Ellis.*
Attorney for defendants: *Freeland.*

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Coroner, Election of—7 & 8 *Vict. c.* 92—*Sheriff's Declaration of Election final.* *June* 2.

Quo warranto, calling on the defendant to shew by what authority he exercised the office of coroner for a district of a county. Plea, that after 7 & 8 Vict. c. 92, a writ was issued to the sheriff, commanding him to elect a coroner; that the sheriff duly appointed and held a court for the purpose; and that the defendant, being duly qualified, was one of three candidates nominated, and a poll being demanded was duly taken the next day but one, and at the close of the poll the poll books were duly sealed, and delivered to the sheriff; that the court re-assembled on the day next but one after the close of the poll, and the sheriff then opened the books, and cast up the number of votes, and openly declared the state of the poll, and made proclamation that the defendant was duly chosen by a majority of such persons residing within the district as were duly qualified to vote:—

Held, that the plea was good without alleging that the defendant was duly elected by a majority of duly qualified voters: for that the sheriff exercises judicial functions in holding a court for the election of coroner; and his declaration, therefore, of the election is final, and the validity of votes cannot be inquired into on a quo warranto.

INFORMATION, in the nature of a quo warranto, calling upon the defendant to shew by what authority he exercised the office of coroner for the western district of the county of Middlesex.

Plea, that after 7 & 8 Vict. c. 92, and 23 & 24 Vict. c. 116, on a vacancy occurring, a writ was issued by the Queen to the sheriff of the county, commanding him to cause another coroner to be elected for the district; that the sheriff duly appointed and held a court for the purpose; and that the defendant, being duly qualified, was one of three candidates nominated; and a poll having been demanded, the sheriff adjourned the court to eight in the forenoon of the next day but one, and a poll was then duly taken for eight hours, and at the close of the poll the poll books were duly sealed and delivered to the sheriff; that the court re-assembled on the day next but one after the close of the poll, and then and there the sheriff openly broke the seals on the books, and cast up the number of votes, and openly declared the state of the poll, and made proclamation that the defendant was duly chosen by a majority of the persons residing within the district who were at the time of the election duly qualified to vote at the election of a

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coroner for the district. Averment, that the defendant was duly proclaimed to have been elected coroner pursuant to the statute, &c.

Demurrer, on the ground that the plea did not allege that the defendant was duly elected by a majority of duly qualified voters.

Joinder.

Second replication, that the defendant was not duly elected by a majority of voters duly qualified.

Demurrer and joinder.

Keane, Q.C. (*Day* with him), for the relator. The 7 & 8 Vict. c. 92, ss. 1, 10, and 23 & 24 Vict. c. 116, s. 2 (1), having repealed the old statute of 58 Geo. 3, c. 95, and reduced the time for hold-

(1) By 7 & 8 Vict. c. 92, s. 1, after reciting that the regulations for the elections of coroners for counties are insufficient, and that such elections are made with much inconvenience, and are attended with great and unnecessary expense, 58 Geo. 3, c. 95, is repealed; by ss. 2–8 provision is made for dividing counties into districts.

S. 9. From and after the time when any county shall have been so divided, every election of a coroner for any such district shall be held at some place within the district in which he shall be elected to serve the office of coroner; and every person to be so elected shall be chosen by a majority of such persons residing within such district as shall at the time of such election be duly qualified to vote at the elections of coroners for the said county.

S. 10. From and after the division of any counties into coroners districts, upon every election to be made of any coroner or coroners for any county, the sheriff of the county where such election shall be made shall hold a court for the same election at some convenient place within the district for which the election of coroner shall take place, on some day to be by him appointed, which day shall not be less than seven days, nor more than fourteen days, after the receipt of the writ de coronatore eligendo; and in case the said election be not then determined upon the view, with the consent of the electors there present, but that a poll shall be demanded for determination thereof, then the said sheriff, or in his absence his undersheriff, shall adjourn the same court to eight of the clock in the forenoon of the next day but one, unless such next day but one shall be Saturday or Sunday, and then of the Monday following; and the said sheriff, or in his absence the undersheriff, with such others as shall be deputed by him, shall then and there proceed to take the said poll in some public place or places by the same sheriff, or his undersheriff, as aforesaid, in his absence, or others appointed for the taking thereof as aforesaid; and such polling shall continue for two days only [for one day only, by 23 & 24 Vict. c. 116, s. 2], for eight hours in each day; and no poll shall be kept open later than four in the afternoon of either of the said days.

By ss. 11, 12, places are to be fixed for taking the poll, and booths to be erected. By s. 13, poll clerks are to be appointed and sworn to take the poll indifferently, . . . and "to poll no elector

ing the election of coroner from ten days to one day, have practically rendered the opportunity for a scrutiny before the sheriff impossible. By s. 9 of 7 & 8 Vict. c. 92, the election is to be by such persons residing within the district as shall be duly qualified. The plea does not allege that the defendant was elected by a majority of such persons; and thus an attempt is made to exclude the relator from any scrutiny at all into the validity of the election. The sheriff now having no opportunity of holding a scrutiny, this can only be done by means of a quo warranto, which was the course pursued in *Reg.* v. *Day.* (1) See also the observations of Lord Cranworth, C. in *In re Coroner of Hemel Hempstead.* (2)

[LUSH, J. In that case the parties consented to the course pursued.]

It will be said that the sheriff is acting judicially, but there is nothing judicial in his duties under 7 & 8 Vict. c. 92.

Gray, Q.C. (*H. Shephard* with him), for the defendant. There is

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who is not sworn, if required to be sworn by the candidates, or either of them; . . . and every elector, before he is admitted to poll at the same election, shall, if required by or on behalf of any candidate, first take the oath hereinafter mentioned; which oath the said sheriff, by himself or his undersheriff, or such sworn clerk by him appointed for taking the poll, shall have authority to administer." The oath (similar to that in 58 Geo. 3, c. 95, s. 1) is, that the elector is possessed of a freehold estate, giving the situation in the county, and that it has not been fraudulently or colourably granted to him for the purpose of qualifying him to vote at the election; that his place of abode is at ——; that he is twenty-one years of age, and has not polled before at this election.

By s. 14, any elector wilfully and falsely taking the oath is to be liable to the penalties of perjury.

S. 15. "The poll clerks shall, at the close of the poll, inclose and send their several books, and shall publicly deliver them so inclosed and sealed, to the sheriff, undersheriff, or sheriff's deputy, presiding at such poll, who shall give a receipt for the same; and every such deputy who shall have received any such poll book, shall forthwith deliver or transmit the same so inclosed and sealed to the sheriff or his undersheriff, who shall receive and keep all the poll books unopened until the re-assembling of the court on the next day but one after the close of the poll, unless such next day but one shall be Sunday, and then on the Monday following, when he shall openly break the seals thereon, and cast up the number of votes as they appear on the said several books, and shall openly declare the state of the poll, and shall make proclamation of the person chosen, not later than two of the clock in the afternoon of the said day."

(1) 3 E. & B. 859; 23 L. J. (Q.B.) 317.

(2) 5 De G. M. & G. 228, 232.

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the highest authority for saying that the sheriff acts judicially in holding the county court for the election of coroner. In Dyer, 165, it is said that the patents of the judges and other officers "are determined by the death of the king who made them: otherwise it is of coroners who are chosen by writ." And Coke, citing this, in 2 Inst. 175, says: "It is holden in our books, that albeit the king dieth, yet the coroner, because he is elected by the freeholders of the county by writ, and returned of record in the Chancery, which is a judicial act, remained." Although the old statute 58 Geo. 3, c. 95, is repealed by 7 & 8 Vict. c. 92, s. 1, the course of election is virtually precisely the same as before, the number of days alone being reduced; and s. 10 expressly directs that the sheriff shall hold a special county court for the election of coroner. The power, under ss. 13, 14, of administering the oath as to qualification to any elector on the requisition of any candidate, and the punishment of perjury, are quite sufficient to secure the elections being by duly qualified persons.

COCKBURN, C.J. I am of opinion that the plea is good, and that there must be judgment for the defendant. I entertain no doubt that the sheriff, in holding the county court for the election of coroner, and taking the poll of valid electors, and determining which of the candidates is chosen, is exercising functions of a judicial character. He is the judge of the court, and under the old system, and under the old statutes, part of the business was to take a scrutiny in the course of the election, and when any vote was disputed, very much in the same way as under the old system of election of members of parliament, it was the practice while the election was going on for the sheriff to inquire into the validity of votes judicially, and a judgment was pronounced in the matter, and the vote admitted or rejected according to the result of the inquiry. We have also the high authority of Lord Coke, that the sheriff exercises judicial functions. (1) I take it to be clear that when a scrutiny of this kind is practically abolished, it could not have been intended that there should be an appeal in a quo warranto to this Court. There never was such a proceeding heard of as the intervention of a jury by way of appeal from the de-

(1) 2 Inst. 175.

cision of the sheriff. Mr. Keane says the new Acts have rendered a scrutiny impossible, by limiting the time for the duration of the poll to one day, so that there is no time for inquiry. That may be so; but there is no reason, because the Acts have rendered a scrutiny by the sheriff impossible, that the duty is to be transferred to this Court. The legislature has found it expedient to shorten the time of polling, because while the poll might remain open for ten days the expense was such as to deter candidates from standing, and they have accordingly limited the polling to one day. But, while thus abridging the time, the legislature has left the power of administering the oath to any elector to whom any candidate may require it to be put. This may be subject to inconvenience, but the legislature may have thought that by leaving it open to indict any elector for perjury who has falsely sworn to his qualification, sufficient security was obtained, as persons would not be likely to run the risk of the penalties of perjury. At all events I do not think the burthen is cast on this Court of making this inquiry with a jury,—of all tribunals the most inconvenient and ill adapted for the purpose. I am very far from saying that there may not be cases in which a quo warranto information would lie as to the office of coroner; as where the candidate elected was personally disqualified, or where the election might not have been properly conducted. But when the object is simply a scrutiny into the validity of the votes, I think we are precluded by the statement in the plea, that the sheriff has duly held the court and proclaimed the defendant elected by a majority. There must, therefore, be judgment for the defendant.

MELLOR, J. I am of the same opinion. The question is simply who is to determine whether a coroner is elected by a majority of votes. I am of opinion that it is the sheriff in the county court who is to do this; therefore the plea is perfectly right, and the allegation, that the sheriff held the court and duly proclaimed the defendant elected by a majority of votes, is all that is necessary on the part of the defendant to justify him in acting as coroner. It is true that it would appear that now the only security is the power to administer the oath and the punishment which might follow a false

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statement by the elector. It may be a very imperfect security, but it is the only protection the statute seems to have intended. It is therefore clear that our judgment must be for the defendant, as we cannot say the plea is bad for omitting the allegation that the defendant was duly elected by a majority of valid votes.

LUSH and HAYES, JJ., concurred.

Judgment for the defendant.

Attorneys for relator: *Merriman & Co.*
Attorney for defendant: *J. F. Hand.*

June 2.

EDWARDS, APPELLANT; THE OVERSEERS OF RUSHOLME, RESPONDENTS.

Poor-rate—Apportionment under 17 *Geo.* 2, *c.* 38, *s.* 12.

5 L.D. 21
7 Q.B.D. 126

By s. 12 of 17 Geo. 2, c. 38, where any person shall come into or occupy any house, &c., out of which any other person assessed to any poor-rate shall be removed, or which at the time of making the rate was empty or unoccupied, every person so removing from and every person so coming into or occupying the same shall be liable to pay to such rate, in proportion to the time that such person occupied the same respectively.

A poor-rate for eleven months having been made on the appellant on the 25th of October, 1866, in respect of a house which he was then occupying, he went out of occupation on the 8th of November following; the house remained unoccupied till the 10th of May, 1867, when a new tenant entered:—

Held, that the appellant was liable to pay to the rate for the time the house remained unoccupied as well as for the fourteen days during which he occupied it.

CASE stated by the Stipendiary Magistrate of Manchester, &c., under 20 & 21 Vict. c. 43.

On the 25th of October, 1866, the respondents made a poor-rate for their township for the ensuing eleven months, which was duly allowed and published.

At the date of the making of the rate, the appellant was the tenant and occupier of a dwelling house in the township; but he left it on the 8th of November. The house remained unoccupied until the 10th of May following, when another tenant entered into occupation.

After the entry of the new tenant, the respondents apportioned the rate under 17 Geo. 2, c. 38, s. 12 (1), and charged the appellant rather less than six months and a half of the whole rate, extending over the time between the 25th of October, 1866, the date of the making of the rate, and the 20th of May, 1867, when the new tenant entered into occupation; and they charged the remaining proportion of the rate to the new tenant.

No demand of the rate or any portion of it was ever made on the appellant while he occupied the dwelling house, nor until after the new tenant came into occupation, the appellant having removed from the township and his address not being known.

The appellant, upon receiving notice of the apportionment, objected to it, and to the principle on which it was made, and contended that by 17 Geo. 2, c. 38, s. 12, he was only liable to pay the proportion of the rate for the time he occupied the house, viz., fourteen days.

On the question of the apportionment coming before him for decision, the magistrate was of opinion that the appellant, being in occupation at the time the rate was made, was liable under s. 12 to pay the rate, not only for the time he occupied, but also for the period during which the house remained unoccupied, up to the time the new tenant entered into possession, and gave his decision against the appellant accordingly.

The question for the Court was, whether the appellant was liable under 17 Geo. 2, c. 38, s. 12, to pay a proportionate part of

(1) 17 Geo. 2, c. 38, s. 12:—"And whereas persons frequently remove out of parishes and places without paying the rates assessed on them, and other persons do enter and occupy their houses or tenements part of the year, by reason whereof great sums are annually lost to such parishes and places; be it therefore enacted, that where any person or persons shall come into or occupy any house, land, tenement, or hereditament, or other premises, out of or from which any other person assessed shall be removed, or which at the time of making such rate was empty or unoccupied, that then every person so removing from, and every person so coming into or occupying the same, shall be liable to pay to such rate, in proportion to the time that such person occupied the same respectively, in the same manner and under the like penalty of distress as if such person so removing had not removed, or such person so coming in or occupying had been originally rated and assessed in such rate; which said proportion, in case of dispute, shall be ascertained by any two or more of his Majesty's justices of the peace." This section is repealed by 32 & 33 Vict. c. 41, s. 16, post, p. 559, n.

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the rate for the time during which the house was unoccupied, viz., between the 8th of November and the 10th of May, or whether he was only liable to a proportionate part for the fourteen days during which he occupied the house after the making of the rate.

J. Kay, for the appellant. Section 12 only made the appellant, "as the person removing," liable to pay to the rate "in proportion to the time that he occupied."

Ambrose, for the respondents. Under the statute of Elizabeth there was full power to enforce the rate against the occupier immediately on its allowance, and by s. 12 of 17 Geo. 2, c. 38, publication only was added; and then by s. 7, power is given to levy on the occupier's goods, wherever they may be; and from this and the recital of s. 12, it is clear that the enactment is not for the relief of the outgoing tenant, but for the benefit of the overseers of the parish, that they may have the liability of the new occupier pro ratâ. The outgoing tenant remains liable as he was before, at least for the proportion up to the time the new tenant came in: *Flatcher* v. *Boodle* (1) shews that this primary liability still remains.

[COCKBURN, C.J. The rate is payable from the time it is made. If no person comes in the outgoing tenant would still be liable for the whole, or he might have been distrained upon for the whole the day before he went out.]

J. Kay, in reply. The argument for the respondents gives no force to the enactment that the outgoing tenant shall pay in proportion to the time he occupied.

COCKBURN, C.J. The enactment is not very easy to construe with perfect satisfaction; and it would appear that obscure statutes are not confined to our own day. When we come to deal with the section it is necessary to look to the recital which precedes the enacting part, and it is clear from that recital that the legislature were not proceeding with the design of making an equitable adjustment between the outgoing and incoming occupier, but with a design to prevent the loss which accrued to parishes from per-

(1) 34 L. J. (C.P.) 77; 18 C. B. (N.S.) 152.

sons liable to a poor-rate failing to discharge their liability, and leaving the overseers no remedy by reason of their going away with their goods; and they accordingly enacted that the period of occupation shall be divided between the outgoing and incoming occupier, and that each shall be liable to pay his proportion of the rate with reference to the length of his occupation. In thus enacting, I cannot help thinking that the legislature contemplated the occupation of the incoming tenant as following, as a matter of course, immediately on the leaving of the old tenant; and that the possibility, that between the going out of the one and the coming in of the other there might be a period during which the premises might remain unoccupied, was lost sight of. What they had in mind was, that quarter-day, or some other day for the determination of the tenancy, might occur, and the old tenant go out and a new one come in, before the overseers had obtained payment of the rate; and in such a case they enacted that the rate should be apportioned between the two. That leaves such a case as the present unprovided for. How is it to be dealt with? I cannot think the legislature intended to relieve the first occupier from all liability except during his occupation: because if no new tenant had come in the original occupier would have continued to be liable for the whole rate. And it was with a view to this continued liability that s. 7 gave a remedy by distress against the occupier's goods, wherever they might be; and therefore it seems clear that the legislature did not intend to relieve the original occupier from liability, but intended to give an additional remedy against the new occupier. I think, therefore, by so reading s. 12, and holding the outgoing tenant to be liable up to the time that the new tenant comes in, we shall be carrying out the intention of the legislature and solving the difficulty which the terms of the enactment present. It was clearly the intention of the legislature not to relieve the outgoing tenant, and clearly the intention to give the parish a remedy against the new occupier for the proportion, during the time the rate should be running after he came in; but for the intermediate time, as the first occupier was always liable for the whole, so he remains liable for the period during which there is no actual occupier. The magistrate was therefore right, and this decision must be affirmed.

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MELLOR, J. I am of the same opinion. The object of the section was to protect the parish. And the legislature had to deal with two classes, first, where there is a person in occupation when the rate is made, who afterwards goes out; in which case it is clear that it was intended that he should remain liable; and, by s. 7, remedies are given against his goods, although removed from the premises. Another class was where there was no person in occupation when the rate was made; in such a case they could only deal with an incoming tenant, and it was intended to give the parish the benefit of his contribution towards the rate for so long as he occupies. But as to the outgoing tenant there is no intention evinced to give him any relief; and I cannot come to any other conclusion than that the section gives a double remedy so far as the time which is covered by the occupation of the new tenant, leaving the liability of the outgoing tenant untouched. I am therefore of opinion that the magistrate was right.

LUSH, J. We must put such a meaning on s. 12 as will effect the obvious intention of the legislature; and that was, not to relieve outgoing tenants, but to secure parishes against loss from their leaving without having paid the current rate. The legislature had already, by s. 7, given the overseers an additional remedy against the original occupier; and the recital of s. 12 shews what the grievance was which it was intended to remedy; and the primary object was to remedy this grievance by making the incoming tenant proportionably liable. We must do some little violence to the language used; and if the enactment were imposing a new liability on the old tenant as well as on the new one, no doubt we could not say that the old tenant was to be held liable during the intermediate time between his going out and the new tenant coming in; but the enactment is imposing no new liability on the outgoing tenant, for he was already liable to the whole rate, and he is not relieved by the enactment, except so far as that, where there is a new occupier, the latter is to pay for the time that he actually occupies. The original occupier, therefore, remains liable for all except that which is obtained from the new occupier, and the magistrate was right.

HAYES, J. The outgoing tenant continues liable de die in diem up to the moment of the new tenant coming in, and he then only ceases to be liable. 1869

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Judgment for the respondents. (1)

Attorneys for appellant: *Johnson & Weatheralls.*
Attorneys for respondents: *N. C. & C. Milne.*

THE QUEEN, ON THE PROSECUTION OF WILLIAM COOK, RESPONDENT, v. WILLIAM WOOD, APPELLANT. *June 7.*

Bread, Sale of, otherwise than by Weight—Bread "usually sold" as French or Fancy Bread—6 & 7 *Wm.* 4, *c.* 37, *s.* 4—3 *Geo.* 4, *c. cvi.*—1 & 2 *Vict. c.* 28.

By 6 & 7 Wm. 4, c. 37, s. 4, any baker or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread without previously weighing the same:—

Held (by Lush and Hayes, JJ.; Hannen, J., dissenting), that bread, which was usually sold as fancy bread at the time of the passing of the Act (1836), but was not usually sold as fancy bread at the time of the sale, was not within the proviso.

AT a petty session holden at Epsom on the 28th of October, 1867, the appellant was convicted on an information exhibited by the respondent, the inspector of weights and measures, for that he,

(1) By 32 & 33 Vict. c. 41, s. 16 (which comes into operation on the 29th of September, 1869: see s. 22): "If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament, being unoccupied at the time of the making of the rate, become occupied during the period for which the rate is made, the overseers shall enter in the rate-book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseers, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner and with the like remedy of appeal as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made; and the 12th section of the statute, 17 Geo. 2, c. 38, shall be repealed."

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on the 22nd of August, being a baker, unlawfully did sell a certain loaf of bread otherwise and in another manner than by weight, the said loaf not being such bread as is usually sold under the denomination of French or fancy bread or rolls, contrary to 6 & 7 Wm. 4, c. 37, s. 4. (1)

On appeal the quarter sessions affirmed the conviction, subject to a case.

Upon the hearing of the appeal it was found as a fact that a loaf of bread was sold by the appellant to Alfred Cook otherwise than by weight, such loaf of bread not being such as at the time of such sale was usually sold under the denomination of French or fancy bread.

The sessions also found, as a fact, that at the time of the passing of 6 & 7 Wm. 4, c. 37, such bread was usually sold under the denomination of fancy bread.

It was contended on behalf of the appellant that the words "usually sold, &c.," in the 4th section refer to the time of the passing of the Act. On the part of the respondent it was argued that those words refer to the time at which the bread is sold.

The question for the opinion of the Court was, whether the appellant's or respondent's construction of the Act is the correct one.

Nov. 28, 1868. *Mellish, Q.C.*, and *Thompson*, for the respondent. *Denman, Q.C.*, and *Oppenheim*, for the appellant.

THE COURT intimated they would hear the cases of *Reg.* v. *Kennett* and *Reg.* v. *Saunders* (2) before giving judgment.

Cur. adv. vult.

June 7. The judgment of Lush and Hayes, JJ., was delivered by

LUSH, J. We understand the justices to have found, as a fact, that bread, which at the passing of the Act in 1836 was of an exceptional quality and known as fancy bread, has now become the common article of consumption in the neighbourhood, and the

(1) See the section in the judgment of Lush, J., post p. 561.
(2) Post, p. 567.

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question submitted to us is, whether bread of that description is within the enacting part of s. 4 of 6 & 7 Wm. 4, c. 37, or within the proviso. We are of opinion that it is within the enactment. The section runs thus: "From and after the commencement of this Act (1836) all bread sold beyond the limits aforesaid (1) shall be sold by the several bakers or sellers of bread respectively beyond the said limits by weight; and in case any baker or seller of bread beyond the limits aforesaid shall sell or cause to be sold bread in any other manner than by weight, then and in such case every such baker or seller of bread shall for every such offence forfeit and pay any sum not exceeding forty shillings, which the magistrate or magistrates, justice or justices, before whom such offender or offenders shall be convicted, shall order and direct: Provided always, that nothing in this Act contained shall extend or be construed to extend to prevent or hinder any such baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

If the Act had been passed for a limited period only, there might have been reason for supposing that the legislature thought there would be no change in the staple article during that period; and in that case the proviso might well have been read as if the words had been "now usually sold under the denomination of fancy bread." But the Act is a perpetual one, intended to regulate the sale of bread for all time. A similar Act had been in operation in London, and within the bills of mortality since 1822 (3 Geo. 4, c. cvi.), and in 1838 an Act was passed for Ireland in terms precisely the same as regards the present question (1 & 2 Vict. c. 28). The same construction must, of course, be put upon the same words in each Act, and what is the proper reading of them now must be the reading a hundred years hence.

We cannot suppose that the legislature meant to stereotype a particular article, and to say, that because it was then an article of luxury it should be so regarded in all time, no matter what

(1) The limits aforesaid (s. 2) are "out of the city of London and liberties thereof, and beyond the weekly bills of mortality and ten miles of the Royal Exchange." The 3 Geo. 4, c. cvi. s. 4, is in identical terms as to sale *within* those limits. See also 1 & 2 Vict. c. 28, as to Ireland.

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changes or improvements may take place in the common food of the country. So to hold would be, in the course of time, to neutralize the Act instead of making it one of perpetual obligation.

The object of the legislature in passing the Act was to liberate the trade from the restrictions of the Assize Act, and leave the baker at liberty to make bread of any size and shape he pleased, and to charge his own price for it; but in order to protect the customer from imposition it required the baker to sell by weight. He is no longer at liberty to sell at so much per loaf; he must sell at so much per pound, and the customer is to be supplied with so many pounds of bread, unless he chooses to have an article of exceptional quality, something that is not ordinary bread; and if he buys that, the baker is to be at liberty to sell it without reference to its weight. But unless it is of an exceptional character, if it is the common article of consumption, the baker must sell it as such. It is obvious that if what is now ordinary bread is to be treated as exceptional and an article of luxury because it was so at the date of the Act, the enactment becomes a dead letter.

Moreover, this construction of the Act places the customer at the mercy of the baker. For how can the customer know what was fancy bread in 1822 or 1836? Nor does it concern him to know. By the hypothesis, he asks for that which is the staple bread of the neighbourhood, and he loses all the benefit the Act intended for him, if he does not have that bread supplied to him by weight.

We are, therefore, of opinion that the conviction must be affirmed.

HANNEN, J. I am of opinion that our judgment should be for the appellant, and that the conviction should be quashed.

By s. 4 of 6 & 7 Wm. 4, c. 37, it is enacted that "from and after the commencement of that Act all bread sold beyond certain limits out of London shall be sold by weight, provided that nothing in the Act contained "shall extend, or be construed to extend to prevent or hinder any baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread or rolls without previously weighing the same."

The appellant has been convicted of selling without previously

weighing it bread, which at the time of the passing of the Act was usually sold under the denomination of fancy bread, but which at the time of the sale had ceased to be sold under that denomination.

It is not stated in the case under what denomination the bread in question is now sold. It may be sold by some other name which indicates equally with fancy bread that it is the kind which the legislature, at the time of the passing of the Act, intended to, and did, exempt from being sold by weight, but because in course of years it has changed its name, and name only, the magistrates have held that it has ceased to be exempted.

I think that this construction of the Act is erroneous. In the first place, the language of the proviso, in its strict grammatical construction, means which *is* usually sold, i.e., at the passing of the Act. The proper mode of expressing the sense which the magistrates have put upon the section would have been "which shall from time to time be usually sold." And, secondly, it seems to me the objects which the legislature must have had in view will be obtained by construing the words of the proviso as including bread usually sold, at the time of the passing of the Act as fancy bread. The main object of the legislature was to protect the general public in the purchase of household bread. This bread, whether baked in large loaves or in batches, has a smaller surface exposed, from which evaporation and consequent loss of weight can take place; but it was not thought to be necessary to protect in the same way those persons who desired to have a more costly bread, and therefore the baker was exempted from selling by weight that kind of loaves which, by being baked apart, occupy more space in the oven, and lose more of their weight by evaporation.

These reasons equally apply to the kind of bread, which was once sold under the name of fancy bread, now that its name, but not its character, is changed. It is a more expensive and uncertain article for the baker to make. Why should the legislature be supposed to have intended that on a mere change of name in the article the law as to the baker's exemption should cease, though the reason for it continued? There can be no doubt that the name has changed, because the habits of the people have changed. So many

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more persons now indulge in fancy bread that it has lost that designation which belonged to it as an article of luxury; but it is very improbable that the legislature contemplated such a change of habits, and intended that the baker's liability should depend not, indeed, on that change, but on the purely accidental consequence following on an alteration of the name. Suppose, in the course of time, "rolls" should cease to be so called, according to the contention of the respondent they must then be sold by weight. Another inconvenient result of this construction would be that the operation of the statute would vary both as to time and place. There must be many parts of England into which the names of French or fancy bread and rolls have not been introduced. The argument for the respondent leads to the conclusion that in such places French bread and rolls, if sold at all, must be sold by weight.

This construction also leaves the time, at which a baker may become subject to a fine for selling fancy bread otherwise than by weight, wholly uncertain. He may have conducted his business for thirty years previously as he did at the passing of the Act, and suddenly find himself, by reason of a change of the language only of other bakers and their customers, liable to a fine for continuing to sell his bread as before. A construction which leads to such results appears to me unreasonable, and should, I think, be rejected.

Conviction affirmed. (1)

Attorney for appellant: *J. Michael.*
Attorneys for respondent: *Dyne & Harvey.*

(1) See the next cases.

THE QUEEN, on the Prosecution of THOMAS DREW, Respondent, v. FANNY KENNETT, Appellant. 1869 *June 7.*

THE QUEEN, on the Prosecution of THE SAME, Respondent, v. ELIZABETH SAUNDERS, Appellant.

Bread, Sale of, otherwise than by Weight—6 & 7 *Wm.* 4, *c.* 37, *s.* 4.

By 6 & 7 Wm. 4, c. 37, s. 4, any baker or seller of bread, who shall sell bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread without having previously weighed the same.

On an information for contravening the above section, it was proved that a purchaser went into a baker's shop and asked for a 4 lb. loaf; a loaf was handed to him by the baker, which turned out substantially deficient in weight. The purchaser did not ask to have the loaf weighed, and there was no evidence as to whether the loaf had ever been weighed or not. The baker contended that the loaf was fancy bread. The justices having convicted the defendant:—

Held, that the customer having asked for bread by weight, the baker was bound to sell by weight, whether the bread was ordinary or fancy bread; and though he was not bound to weigh in the presence of the customer, unless requested to do so, he was bound to weigh at some time or other, and that, as the loaf was substantially deficient in weight, it must be taken, as against the baker, that he had never weighed it; and the conviction was therefore right.

These were two appeals to the Hampshire Quarter Sessions against convictions under 6 & 7 Wm. 4, c. 37, s. 4, for selling bread otherwise than by weight; the sessions affirmed the conviction in each case, subject to a case.

Both the appellants are bakers, residing at Fareham. It was proved, in support of the conviction of the first appellant, that Henry Hawkins, a policeman, went to her shop, and asked for a 4 lb. loaf. A loaf was handed to him across the counter by the appellant. Neither the appellant, nor any other person in her shop, weighed the loaf in the presence of Hawkins. No request, express or implied, was made by him that the loaf should be weighed. The loaf was carried by him to the superintendent of police, by whom it was weighed, and found 6 oz. 4 dwts. deficient in weight.

It was proved, in support of the conviction of the second appel-

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lant, that Hawkins went to her shop and asked for a 2 lb. loaf. A loaf was supplied to him across the counter by the appellant. Neither she, nor any one in her shop, weighed the loaf in the presence of Hawkins. No request, express or implied, was made by him that the loaf should be weighed. The loaf was carried by him to the superintendent of police, by whom it was weighed, and found to be 1 oz. 13 dwts. deficient in weight.

It was contended, on behalf of the appellants, that, in each case, the loaf of bread sold was of that description which is exempted from being weighed, under the proviso in s. 4 of 6 & 7 Wm. 4, c. 37, as coming within the denomination of "fancy bread." It was proved that the loaves in question were made of the same materials as household, or batch bread, but were made up and baked separately from other loaves, and not in batches; that loaves baked separately undergo a greater diminution in weight than loaves baked in batches, by reason of the increase of evaporation; that they become entirely crusty, and assume a different form and solidity from ordinary batch bread.

It was further contended by the appellants, that the mere omission to weigh bread when sold in the presence of the purchaser, (no request having been made by him that such bread should be weighed), is not an offence under the statute.

It was in evidence that a loaf baked separately was sometimes called a "crusty loaf," and sometimes a "fancy loaf;" and it was stated by fifteen witnesses, some of whom were bakers, and others, that they had been in the habit of respectively selling and purchasing such loaves by the name of "fancy loaves," and that such loaves were usually termed by them "fancy loaves." There was no evidence that this was "French bread." It was contended on behalf of the respondent, that the terms "French" and "fancy" were synonymous, and that the loaves in question not being French bread or rolls, the conviction was good under 6 & 7 Wm. 4, c. 37, s. 4.

The questions for the Court were, first, whether bread of the description given by the evidence was included in the proviso to s. 4 of the above statute, and consequently exempted from being weighed; secondly, whether an omission to weigh bread in presence of the purchaser, no request having been made by him that

the same should be weighed in his presence, renders the seller liable to be convicted under the above statute.

If the Court should answer the first question in the affirmative, or the second question in the negative, the convictions were to be quashed.

May 1. *Mellish, Q.C.*, for the appellants.
Maule, Q.C., for the respondent.

Cur. adv. vult.

June 7. After the judgment in *The Queen* v. *Wood* (1) had been delivered,

COCKBURN, C.J. There were two other cases, *The Queen* v. *Kennett*, and *The Queen* v. *Saunders*, before my Brothers Mellor and Hayes and myself, which turned on the same statute, and in which a similar question was raised by the justices, the parties having been convicted and the convictions affirmed by the sessions. It does not appear to us necessary to go into a distinction between common or ordinary bread and fancy bread in these cases. The facts were that in both cases the person applying to purchase bread asked for bread by weight; in one case for a 4 lb. loaf, and in the other case for a 2 lb. loaf. The loaves were delivered as such, and taken away and afterwards weighed. In each instance it turned out that the loaf was substantially deficient in weight. We think, when a customer asks for bread by weight, that clearly is a case in which, whether the baker chooses to give him ordinary bread or fancy bread, the baker is bound to sell by weight. Under the circumstances of the cases, we by no means say that the baker was bound to weigh in the presence of the customer, but he was bound to weigh the bread at some time or other before he sold it, and to sell it by weight instead of by the denomination of household bread, fancy bread, or any other denomination. We think, therefore, the baker being bound to sell by weight, and the loaves having turned out to be deficient in weight, we must take it that they had never been weighed: for we cannot suppose, as against the baker, that he would intentionally pass off upon a customer a loaf which he knew to be deficient in weight. We think, therefore, the magistrates were

(1) Ante, p. 560.

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warranted in coming to the conclusion that the bread had never been weighed. We are of opinion that, under the circumstances, the baker ought to have sold by weight. If he has not sold by weight the case is within the statute, and the conviction is right.

Convictions affirmed.

Attorneys for appellants: *Whites, Renard, & Floyd, for Wallis, Portsmouth.*

Attorney for respondent: *H. Sowton, for T. B. Woodham, Winchester.*

June 8.

CARY AND ANOTHER *v.* DAWSON.

Bankruptcy—Provable Debt—Liability to Pay a Sum of Money on a contingency: 12 & 13 *Vict. c.* 106, *s.* 178; 24 & 25 *Vict. c.* 134, *s.* 154.

6 Ex 314. 7 Ch 39, 43, 13 Eq 72-5 7 C 0 359

In January, 1866, a company lent a sum in consols to be deposited by the promoters of a bill then before parliament; and the two plaintiffs, the defendant, and three others entered into an undertaking with the company, that, if the bill was thrown out the consols should be returned, and if it passed, an equal amount of stock should be transferred to the company, and that a sum, in the nature of interest on the value of the consols at the time they were lent, from the end of six months to the date of the transfer, should be paid to the company. In April, 1866, the defendant was adjudged bankrupt; and in July he obtained his order of discharge. In August the bill was passed, but the consols were not transferred to the company till May, 1867, and the plaintiffs were compelled in June, 1867, to pay under the undertaking 500*l.* as the interest. An action having been brought by the plaintiffs to recover contribution from the defendant of one-sixth of the 500*l.*, the defendant pleaded his discharge in bankruptcy:—

Held, that as the liability under the undertaking depended on an uncertain event, viz. the date at which the consols should be transferred, the amount of liability was not capable of being ascertained; and the plaintiffs' claim was therefore not a debt proveable under 12 & 13 Vict. c. 106, s. 178, nor under 24 & 25 Vict. c. 134, s. 154; and the defendant was therefore not discharged.

DECLARATION for money paid and interest.

Pleas: 1. Never indebted. 2. That the defendant became bankrupt within the true intent of the statutes in force as to bankrupts, and that the alleged cause of action accrued to the plaintiffs before the defendant became bankrupt.

Issue joined.

At the trial before Blackburn, J., at the sittings in Middlesex

after Michaelmas Term, 1867, it appeared that in the session 1865–6, a bill called "The Wye Valley Railway Act" was in progress, and the directors in order to make the deposit in the Court of Chancery in compliance with the Standing Orders of the House of Commons, obtained from the Marine Insurance Company the amount of stock required in January, 1866, paying a certain sum for the use of it for six months; and the following agreement was signed by the plaintiffs, the defendant, and three other directors:—

"We, James Hastie, James Dawson, Thomas Albert Gledstanes, Joseph Cary, George Forman, Henry Hawes Fox, being six of the directors or members of the provisional committee of the company intended to be incorporated by the bill under the proposed short title of 'The Wye Valley Railway Act, 1866,' in consideration of the transfer by you in respect of the deposit for the said bill of the sum of 21,271*l.* 13*s.* 6*d.* consols, to our joint names, do hereby jointly and severally undertake, that on the withdrawal or rejection of the said bill, the sum of consols so deposited shall be forthwith retransferred to you without deduction, and free from any lien for costs or otherwise, or if any such lien shall attach, we shall forthwith discharge and satisfy the same, and that we will do all necessary acts and take all necessary proceedings for releasing the said sum of consols, and causing the same to be retransferred to you with any dividends that may have accrued thereon.

"We further undertake that on the passing of the said bill, a sum of consols equal to the sum so deposited, shall forthwith be purchased in your names or transferred to you, and that we will pay to you a sum equal to the dividends that may have accrued on the said sum of deposited consols at the date at which an equal sum of consols shall be purchased in your names or transferred to you as aforesaid.

"We also undertake and agree to pay to you over and above the sum paid on the delivery hereof, interest at the rate of 5*l.* per centum per annum on the sum of 18,400*l.* sterling, being the value of the said sum of deposited consols at the date of the said transfer to us, for any period which may elapse after the expiration of six months from the date hereof, until the said sum of deposited consols shall be transferred to you, or a sum of consols equal thereto shall be purchased in your names or transferred to you as aforesaid, and also to pay all brokerage and other costs and charges which may be incurred by you in reference to this matter.

"Dated this day of January, 1866."

The bill was passed on the 10th of August, 1866, and in Michaelmas Term a petition to transfer was duly presented, but, by some mistake in the Transfer Office, it was not carried out; this was subsequently rectified, and the stock retransferred to the Marine Insurance Company, in May, 1867.

The company required interest to the amount of 500*l.* under the last clause in the agreement, which the two plaintiffs paid on the 8th of June, 1867.

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The defendant was adjudged bankrupt on the 27th of April, 1866, and obtained his order of discharge on the 12th of July, 1866.

A verdict was directed for the defendant, on the plea of bankruptcy, with leave to move to enter a verdict for the plaintiffs for 83*l.* 13*s.* 4*d.*, the defendant's contribution.

A rule was obtained accordingly, on the ground that the bankruptcy of the defendant was no answer to the plaintiffs' claim, as it was not proveable against the defendant's estate.

May 31. *Murphy* shewed cause, and contended that the defendant was discharged by his order from all claim in respect of this undertaking. The company might have proved for the whole against the defendant, and that was equivalent to payment by him. He relied on ss. 172, 177, and 178 of 12 & 13 Vict. c. 106, and ss. 153 and 154 of 24 & 25 Vict. c. 134, and cited *Warburgh* v. *Tucker* (1); *Saunders* v. *Best* (2); *In re Pickering* (3); *Simpson* v. *Mirabita.* (4)

H. James, in support of the rule, contended that the plaintiffs' claim was not proveable under any of the sections of either statute. It was impossible to ascertain the value of the debt; the amount depended on several contingencies. If the bill had been withdrawn or passed, and the stock been transferred within six months, no interest at all would have been payable. Again, the amount depended on the date of the passing, and the date of the replacing of the stock. This was not a contingency within the meaning of any of the sections of the Act of 1849; nor was it a contract to pay or indemnify any person against the payment of a sum of money within s. 154 of the Act of 1861. He cited *Martin's Patent Anchor Company* v. *Morton* (5), *Hastie's Case* (6), and *Brett* v. *Jackson.* (7)

Cur. adv. vult.

June 8. The judgment of the Court (Cockburn, C.J., Blackburn, Lush, and Hayes, JJ.) was delivered by

BLACKBURN, J. This was an action for money paid. The only material plea was bankruptcy.

(1) E. B. & E. 914; 28 L. J. (Q.B.) 56. 4 Jur. (N.S.) 1142.
(2) 17 C. B. (N.S.) 731. 10 Jur. (N.S.) 204.
(3) Law Rep. 4 Ch. App. 58.
(4) Ante, p. 257.
(5) Law Rep. 3 Q. B. 306.
(6) Law Rep. 4 Ch. App. 274.
(7) Law Rep. 4 C. P. 259.

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On the trial before me, it appeared that the Marine Insurance Company had in January, 1866, lent a large sum in consols to be deposited by the promoters of a bill then before parliament. The plaintiffs, the defendant, and others, six in all, entered into an undertaking with the company, that, if the bill was thrown out, the consols should be returned, and that, if it passed (which was the event that happened), an equal amount of stock should be transferred to the company, and that a sum, in the nature of interest on the value of the consols at the time they were lent from the end of six months to the date of the transfer, should be paid to the company. Interest for the first six months had been paid to the company as the consideration for the loan of the consols.

In April, 1866, the defendant was adjudicated a bankrupt. In July, 1866, he obtained his order of discharge.

In August, 1866, the bill was passed, but the consols were not transferred till May, 1867, and the plaintiffs were compelled to pay under the undertaking 500*l.* as the equivalent for interest on the 8th of June, 1867. The action was brought to recover contribution for one-sixth part of this sum.

A verdict was entered for the defendant on the plea of bankruptcy, with leave to move to enter a verdict for the plaintiffs.

A rule accordingly was obtained, against which cause was shewn in this term. The only question was, whether the claim against the defendant in respect of his undertaking could in any way have been proved under the bankruptcy; for, if so, the defendant was discharged by his order. Had the undertaking been to pay the value of the consols within a reasonable time after the passing of the bill, together with interest from a fixed day up to the actual payment, there seems no doubt that the principal debt would have been proveable under 12 & 13 Vict. c. 106, s. 178, as a contingent liability, and the interest would in that case have been so much considered an accessary to the principal that it might have been proved along with it, as in *Ex parte Barwis* (1); though in this case, at the time of the bankruptcy, it was uncertain what sum might be payable as interest along with the principal in the event (which has happened) of the bill not being passed till after the fixed day.

(1) 6 De G. M. & G. 762; 25 L. J. (Bky.) 10.

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But though a promise to replace a particular amount of consols at a future day is not in substance different from a liability to pay a sum of money, and though, if the contract be broken before bankruptcy, the amount which is then ascertained may be proved (see *Betteley* v. *Stainsby*) (1); still whilst the day at which the stock is to be replaced, and consequently the value of what is then to be replaced, is, at the time of the bankruptcy, unascertained, we think it cannot be treated as a liability to pay money within s. 178.

The 153rd section of 24 & 25 Vict. c. 134, removes the objection that a jury is required to ascertain the amount, when the liability to damages is, at the time of the adjudication, already incurred; but there is no provision in the bankrupt laws as yet under which such a liability, not yet incurred at the time of bankruptcy, can be proved.

The liability, therefore, under the promise to pay the interest must, if proveable at all, be proved as a separate matter, and we think that the case of *Warburg* v. *Tucker* (2) is a decisive authority that it cannot be proved under 12 & 13 Vict. c. 106, s. 178.

The question then arises, whether it can be proved under 24 & 25 Vict. c. 134, s. 154. We think that though the general words "any other sums of money, whether yearly or otherwise," taken by themselves, would include every kind of payment, yet they must be restrained by the context to sums of money so far ejusdem generis with premiums of insurance that the liability may at the time of the adjudication be capable of valuation. This is distinctly laid down by Giffard, L.J., in *Ex parte Hastie.* (3) And we are unable to see how or on what principle a value could have been put in April, 1866, when the adjudication took place, on the liability of the defendant, in case he and his co-contractors failed to transfer the stock in due time, according to their undertaking, to pay interest until they did perform it.

We think, therefore, that the rule must be made absolute.

Rule absolute.

Attorney for plaintiffs: *G. F. Parson.*

Attorneys for defendant: *Tatham & Sons.*

(1) 12 C. B. (N.S.) 477; 31 L. J. (C.P.) 337.

(2) E. B. & E. 914; 28 L. J. (Q.B.) 56.

(3) Law Rep. 4 Ch. App. 274.

Ex parte WASON.

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June 9.

Vexatious Indictments Act (22 & 23 *Vict. c.* 17), *s.* 2—*Duty of Justice as to taking Recognizance of Prosecutor—Conspiracy by Members of Parliament.*

A magistrate, if he refuses to commit or bail the person charged, is bound, under 22 & 23 Vict. c. 17, s. 2, to take the recognizance of the prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse if no indictable offence is disclosed.

Where, therefore, the offence charged is that of conspiracy, by three persons, two of whom are members of the House of Lords, to deceive the House, and so to prevent the due course of justice and injure and prejudice a third person, by making statements in the House which they knew to be false, the magistrate is right in refusing to take any proceedings: as members of either House of Parliament are not civilly or criminally liable for any statements made in the House, nor for a conspiracy to make such statements.

Rigby Wason moved, in person, for a rule calling on one of the metropolitan police magistrates to shew cause why he should not take the recognizance of the applicant (under 22 & 23 Vict. c. 17, s. 2) (1), to prosecute on a charge preferred by him before the magistrate against Earl Russell, Lord Chelmsford, and the Lord Chief Baron, for conspiracy.

The applicant's affidavit set out the information, of which the following are the material parts:—1. On the 5th of February, 1867, I gave to Earl Russell a petition from myself to the House of Lords, which he had previously promised to present. Such petition distinctly charged the Lord Chief Baron with having, when a Queen's Counsel, told a wilful and deliberate falsehood to

(1) 22 & 23 Vict. c. 17, s. 2:—"That where any charge or complaint shall be made before any one or more of her Majesty's justices of the peace that any person has committed any of the offences aforesaid [conspiracy being one] within the jurisdiction of such justice, and such justice shall refuse to commit or to bail the person charged with such offence to be tried for the same, then, in case the prosecutor shall desire to prefer an indictment respecting the said offence, it shall be lawful for the said justice and he is hereby required to take the recognizance of such prosecutor to prosecute the said charge or complaint, and to transmit such recognizance, information, and depositions, if any, to the court in which such indictment ought to be preferred, in the same manner as such justice would have done in case he had committed the person charged to be tried for such offence."

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a committee of the House of Commons, sitting as a judicial tribunal. 3. Such petition prayed for an inquiry into the charges contained in the petition; and if found true, that the law, which declared that it may be lawful to remove judges by addresses from both Houses of Parliament, might be put into operation. 4. Earl Russell, Lord Chelmsford, and the Lord Chief Baron did prevent the course of justice, and did injure and prejudice a third party, by making statements which they knew were not true, in order to prevent the prayer of my petition being granted; and they did make such statements after conferring together. 5. I verily believe that Earl Russell, Lord Chelmsford, and the Lord Chief Baron did, between the 5th and 13th of February, 1867, conspire, combine, confederate, and agree together to prevent the course of justice, and to injure and prejudice a third party, to wit, me, this deponent. 6. Such conspiracy to prevent the course of justice consisted of the fact that Earl Russell, Lord Chelmsford, and the Lord Chief Baron agreed to make statements which they knew were not true, in order to prevent the prayer of my petition for inquiry being granted. 7. Such conspiracy to injure and prejudice a third party, to wit, &c., consisted in the fact that Earl Russell, Lord Chelmsford, and the Lord Chief Baron did agree to deceive the House of Lords by stating that the charge of falsehood contained in my petition was false, and that I was a calumniator; when Earl Russell, Lord Chelmsford, and the Lord Chief Baron well knew that the charge of falsehood committed by the Lord Chief Baron, when Queen's Counsel, was perfectly true. 8. I desire to prefer an indictment against Earl Russell, Lord Chelmsford, and the Lord Chief Baron for conspiracy; and I therefore request you [the magistrate] to take my recognizance, in accordance with 22 & 23 Vict. c. 17.

The magistrate adjourned the case for the purpose of taking the applicant's recognizance; but at the adjournment he refused to do so, on the ground that no indictable offence was disclosed by the information.

COCKBURN, C.J. I am of opinion that a rule ought not to be granted. I entirely agree that, supposing the matter brought before the magistrate had been matter cognizable by the criminal law,

and upon which an indictment might have been preferred, the magistrate would have had no discretion, but would have been bound to proceed as directed by the statute: and if, in such a case, the magistrate had refused to receive the information, it would have been the duty of this Court, ex debito justitiæ, to grant a rule or issue a mandamus, commanding the magistrate to take the recognizances. On the other hand, I have no doubt that, supposing the matter brought before the magistrate does not establish facts upon which an indictment could be preferred and sustained, the magistrate has a discretion which, if rightly exercised, we ought to uphold; and the question is whether the matter brought by the present applicant before the magistrate was subject-matter for an indictment. To ascertain this we must look at the information laid before the magistrate; and I gather from the affidavit that the information was in substance this,—Mr. Wason having given Earl Russell a petition to present to the House of Lords, which charged the Lord Chief Baron with having told a wilful and deliberate falsehood, and the object of which was that the Lord Chief Baron might be removed from his office by an address of both Houses of Parliament, the information goes on to charge, that Earl Russell, Lord Chelmsford, and the Lord Chief Baron conspired together to prevent the course of justice by agreeing to make statements which they knew to be untrue. The information then charges that Earl Russell, Lord Chelmsford, and the Lord Chief Baron agreed to deceive the House of Lords by stating that the charge of falsehood brought against the Lord Chief Baron was unfounded and false, whereas they knew it to be true. Now, inasmuch as these statements were alleged to have been for the purpose of preventing the prayer of the petition, and the statements could not have had that effect unless made in the House of Lords, it seems to me that the fair and legitimate inference is that the alleged conspiracy was to make, and that the statements were made, in the House of Lords. I think, therefore, that the magistrate, looking at this and the rest of the information, was warranted in coming to the conclusion, that Mr. Wason charged and proposed to make the substance of the indictment, that these three persons did conspire to deceive the House of Lords by statements made in the House of Lords for the purpose of frustrating the petition. Such

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a charge could not be maintained in a court of law. It is clear that statements made by members of either House of Parliament in their places in the House, though they might be untrue to their knowledge, could not be made the foundation of civil or criminal proceedings, however injurious they might be to the interest of a third person. And a conspiracy to make such statements would not make the persons guilty of it amenable to the criminal law. The magistrate therefore came to a right conclusion, when, after reconsidering his first determination, he decided that he was not bound to take Mr. Wason's recognizance to prosecute the charge, inasmuch as he had not brought before the magistrate facts disclosing an indictable offence.

BLACKBURN, J. I am entirely of the same opinion. I fully agree that when a charge or complaint of one of the offences named in the statute has been brought before a magistrate, he has no discretion but to commit or bail the person charged, or take the recognizance of the prosecutor; and therefore if such a charge has been brought before a magistrate and he has refused to take either alternative, we should be bound to interfere and compel him to do so. The magistrate, in the present case, appears at first to have thought he ought to receive the information, but on reflection he came to the conclusion that there was no charge disclosed of any indictable offence, and he refused to do anything; and I agree that he did right to refuse. I perfectly agree with my Lord as to what the substance of the information is; and when the House is sitting and statements are made in either House of Parliament, the member making them is not amenable to the criminal law. It is quite clear that no indictment will lie for making them, nor for a conspiracy or agreement to make them, even though the statements be false to the knowledge of the persons making them. I entirely concur in thinking that the information did only charge an agreement to make statements in the House of Lords, and therefore did not charge any indictable offence.

LUSH, J. I am also of the same opinion. The only question is whether the information contained a charge of an indictable offence. If it did, the magistrate ought to have bound over Mr. Wason to

prosecute; if it did not, the magistrate was right in refusing. I quite agree with what has been said as to what the information amounts to. I cannot doubt that it charges a conspiracy to deceive the House of Lords, and so frustrate the application, by means of making false statements in the House. I am clearly of opinion that we ought not to allow it to be doubted for a moment that the motives or intentions of members of either House cannot be inquired into by criminal proceedings with respect to anything they may do or say in the House.

HAYES, J., concurred.

Rule refused.

THE QUEEN *v.* BARROW AND OTHERS.

June 11

Vestry—Notice for holding Vestry—District created under Church Building Acts—Sturges Bourne's Act (58 *Geo.* 3, *c.* 69), *s.* 1.

58 Geo. 3, c. 69, s. 1, enacts that no vestry or meeting of the inhabitants in vestry for any parish shall be holden until public notice shall have been given of such vestry as therein mentioned:—

Held, that this section does not apply to parishes, created under the Church Building Acts for ecclesiastical purposes only, and not separately maintaining their own poor.

RULE, calling on John Barrow, clerk, vicar of the parish of Bloxwich, in the county of Stafford, and the churchwardens of the parish, to shew cause why a writ of mandamus should not issue commanding them to convene a meeting in vestry of the inhabitant ratepayers of the parish, and proceed to the election of a churchwarden for the remainder of the present year.

Bloxwich is a district created under one of the Church Building Acts (1), it does not separately maintain its own poor, and has no overseers of the poor. Churchwardens for Bloxwich were elected at a meeting of the vestry held at Bloxwich on Easter

(1) The affidavits did not state under which Act the district was created; but it was assumed in argument that it was created under either the first or the second Church Building Act, viz., 58 Geo. 3, c. 45, or 59 Geo. 3, c. 134.

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Tuesday for that purpose. The notice for the holding of the meeting was given by posting it on the church door on the preceding Good Friday. During the last thirty years the election of churchwardens had been always held on Easter Tuesday, and the notice of the meeting had been given on the Good Friday before as in the present case.

The rule was obtained on the ground that the notice for the holding of the vestry was not sufficient under Sturges Bourne's Act (58 Geo. 3, c. 69), as it was not published on some Sunday at least three days before the day appointed for holding the vestry, and that therefore the election which had taken place was void. (1)

J. O. Griffits shewed cause. (2) The notice, no doubt, was not sufficient if Sturges Bourne's Act (3) applies to this case, and the question therefore is whether that Act does apply. The wording of the 1st, 2nd, and 7th sections shews that it was intended to

(1) The rule was also obtained on the ground that there had been misconduct at the election of churchwardens; but this question was not argued.

(2) In the Bail Court, before Lush and Hayes, JJ.

(3) 58 Geo. 3, c. 69, s. 1, recites, "Whereas it is expedient to regulate the manner of holding parish vestries, and the right of voting therein;" and then enacts . . . "that no vestry or meeting of the inhabitants in vestry of or for any parish shall be holden until public notice shall have been given of such vestry . . . three days at the least before the day to be appointed for holding such vestry by the publication of such notice in the parish church or chapel on some Sunday . . . and by affixing the same . . . on the principal door of such church or chapel."

S. 2:—"Minutes of the proceedings and resolutions of every vestry shall be fairly and distinctly entered in a book (to be provided for that purpose by the churchwardens and overseers of the poor), and shall be signed by the chairman" . . . &c., &c.

S. 7:—"All provisions, authorities, and directions in this Act contained in relation to parishes shall extend . . . to all townships, vills, and places having separate overseers of the poor, and maintaining their poor separately, and that all the directions and regulations herein contained in regard to vestries shall extend and be applied to all meetings which may by law be holden of the inhabitants of any parish, township, vill, or place for any of the purposes in this Act expressed; and that the notices by this Act required to be given of every vestry may in places in which there is . . . no parish church or chapel be given in such manner as notices of the like nature shall have been there usually given, or as shall be most effectual for communicating the same to the inhabitants of every such parish, township, vill, or place respectively."

apply only to ordinary common law parishes separately maintaining their own poor, and having overseers of the poor. This is not a common law parish, but is a parish for ecclesiastical purposes only. The provisions of s. 2 requiring the entry of the minutes in a book could not be carried out, as in Bloxwich there are no overseers of the poor, and no books. In any case, Sturges Bourne's Act does not apply to a meeting which is always held on a certain day. It is doubtful if any notice at all was necessary: *In re the Churchwardens of St. Faith.* (1) If, however, any notice was necessary, only a reasonable notice was required; and as notice on the Good Friday has been given for the last thirty years, it was a reasonable notice.

Harington, in support of the rule. Sturges Bourne's Act applies to this case, and therefore the notice was bad. The words of s. 1 are wide enough to comprehend districts created under the Church Building Acts, and there is no reason for cutting down their apparent meaning. Even if this case is not within Sturges Bourne's Act, still there must be a reasonable notice, and the Court will hold by analogy that a reasonable notice is such a notice as is required by Sturges Bourne's Act.

[LUSH, J. If only a reasonable notice is necessary, I think the notice was sufficient.]

LUSH, J. Although I have not been entirely free from doubt, I think that we ought not to put the parties to expense by granting a mandamus. It was a matter admitting of argument, but I think the rule should be discharged. Bloxwich is an ecclesiastical district under either the first or second of the Church Building Acts (58 Geo. 3, c. 45; 59 Geo. 3, c. 134). It is, however, only an ecclesiastical district. The question is, whether Sturges Bourne's Act applies to such a district, and to a vestry meeting held merely for the purpose of electing churchwardens. Having regard to the wording of the Church Building Acts, under one of which this district must have been created, and of Sturges Bourne's Act, I am of opinion that this district is not within Sturges Bourne's Act, which applies to ordinary common law vestries only. Section 73 of 58 Geo. 3, c. 45, the first Church Building Act, provides that "two

(1) 25 L. J. (Q.B.) 168.

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fit and proper persons shall be appointed to act as churchwardens for every church or chapel built or appropriated under the provisions of this Act, at the usual period of appointing parish officers in every year, and shall be chosen, one by the incumbent of the church or chapel for the time being, and the other by the inhabitant householders entitled to vote in the election of churchwardens residing in the district to which the church or chapel shall belong." In the same session Sturges Bourne's Act was passed. The persons then entitled to vote were all persons paying scot and lot, but s. 3 of that Act altered the manner of voting in vestries. In the next session, 59 Geo. 3, c. 134, s. 30, provided that where there shall not be a district vestry belonging to a district under this Act or 58 Geo. 3, c. 45, a select vestry shall be appointed by the Church Building Commissioners. This statute, it is to be observed, was passed in the year after Sturges Bourne's Act, and if it was intended that Sturges Bourne's Act should apply to vestries under this Act, one would have expected that there would have been some expressions to show that intention. There are however no such expressions, and looking at the words of Sturges Bourne's Act and at those of the two Church Building Acts, one passed before and the other after that Act, I come to the conclusion that Sturges Bourne's Act does not apply to vestries of districts created under either of those Acts. The preamble of Sturges Bourne's Act recites:—[The learned judge read the preamble and the 1st section.] At this time one of the Church Building Acts had been passed. The 1st section of Sturges Bourne's Act, in terms, is confined to parishes. The 7th section extends its provisions. [The learned judge read the 7th section.] The early part of this section applies to all places having "separate overseers of the poor, and maintaining their poor separately." The second part applies to "all meetings which may by law be holden of the inhabitants of any parish, township, vill, or place for any of the purposes in this Act expressed." These provisions seem to exclude ecclesiastical districts, which do not separately maintain their own poor. Again, by s. 2, minutes of the proceedings are to be entered in a book to be provided by the churchwardens and overseers of the poor; but in a district such as Bloxwich, created for ecclesiastical purposes only, there are no overseers of the poor and no books. All the

sections contemplate the places mentioned in s. 7 only where there are overseers of the poor, and therefore I think that it cannot be held that Sturges Bourne's Act applies to ecclesiastical districts created under the Church Building Acts.

HAYES, J. I am of the same opinion. I think that the words of the different Acts clearly decide the question. There are no words in the Church Building Acts to bring them within Sturges Bourne's Act, and I think, therefore, that districts created under them are not within that Act, and that consequently its provisions as to the notice for holding vestries do not apply to the vestry for Bloxwich.

Rule discharged.

Attorney for applicant: *Needham.*
Attorneys for defendants: *Monckton & Monckton.*

[IN THE EXCHEQUER CHAMBER.]

June 16.

CRAWSHAY *v.* MORGAN AND OTHERS.

Poor-rate—Non-rateability of Iron Mines—43 Eliz. c. 2, s. 1.

Iron mines are not rateable to the poor-rate under 43 Eliz. c. 2, s. 1, coal mines being the only mines mentioned in the statute.

Affirmed 7 H. L. 304

ACTION against the defendants, the overseers of the township of East Dean, for having seized the plaintiff's goods as a distress for a poor-rate.

A case was stated without pleadings.

The plaintiff was the occupier, and entitled to the beneficial enjoyment of the gales of certain mines of iron ore in the forest of Dean, according to the custom there. He had been rated to the poor-rate in respect of these mines; and the question raised was whether iron mines were rateable to the poor-rate under 43 Eliz. c. 2, which enables overseers to raise funds for the support of the poor by the taxation of "every occupier of lands, houses, tithes, coal mines, or saleable underwood."

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Judgment in the Queen's Bench was taken pro formâ for the plaintiff.

On error,

H. James, for the defendants, cited *Reg.* v. *Todd* (1), and relied on *Jones* v. *Mersey Docks* (2) as having been supposed to have decided that every tenement was rateable.

Manisty, Q.C., for the plaintiff, was not heard.

THE COURT (Kelly, C.B., Channell and Cleasby, BB., Byles, Montague Smith, and Brett, JJ.) pointed out that *Jones* v. *Mersey Docks* (2) was only a decision as to what was a beneficial occupation so as to make the occupier rateable, not as to what subject-matters were rateable; and they "thought it wiser" [in the language of Tindal, C.J., in *Crease* v. *Sawle* (3)] "to abide by the construction which numerous decisions have given to the words of the statute, and which has been for a long time acted upon;" and they therefore held the occupier of an iron mine not to be rateable, coal mines alone being mentioned in the statute.

Judgment affirmed.

Attorneys for plaintiff: *Jones & Stirling.*
Attorneys for defendants: *Rogerson & Ford.*

June 25.

WRIGHT *v.* PEARSON.

Action—Mischievous Animal—Scienter—28 & 29 Vict. c. 60, s. 1—"Cattle."

Section 1 of 28 & 29 Vict. c. 60, enacts that the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity:—

Held, that the word "cattle" in the above section includes horses and mares.

APPEAL from the County Court of Yorkshire, holden at Thirsk.

This was an action by the plaintiff to recover from the defendant

(1) 12 A. & E. 816. (2) 35 L. J. (M.C.) 1; 11 H. L. C. 443. (3) 2 Q. B. at p. 886.

the sum of 41*l.* 8*s.* 2*d.*, for that the defendant knowingly kept a certain ferocious dog, which was accustomed to injure and bite cattle, and which dog, in the month of July, 1868, bit and injured the plaintiff's mare, and caused damage to the amount aforesaid; and for a further count, that the defendant's dog, in the month aforesaid, bit and injured the mare of the plaintiff, whereby the plaintiff suffered damages to the amount aforesaid.

At the trial evidence was given on behalf of the plaintiff, that in the month of July, 1868, the plaintiff was driving his mare in a gig on the high road from Thirsk to Kilvington, and, when about a mile from Thirsk, the dog in question flew out and bit the leg of the mare, and caused it to kick and be injured.

No proof was given by the plaintiff, that the defendant knew the dog was accustomed to bite horses or mares, or was of a savage or ferocious character; and the plaintiff relied entirely upon 28 & 29 Vict. c. 60, s. 1 (1), that no such knowledge was now necessary.

The judge considered it necessary for the plaintiff to prove a scienter in the defendant in an action for keeping a mischievous or savage dog, as, in his opinion, the plaintiff's mare did not come within the true intent and meaning of the term "cattle" mentioned in s. 1 of 28 & 29 Vict. c. 60 (1), and that the statute, therefore, did not apply in this action; and he thereupon directed a judgment of nonsuit to be entered against the plaintiff, with costs.

The question for the opinion of the Court was, whether the term "cattle" in the above statute includes horses or mares.

Kemplay, for the plaintiff. The word "cattle" is large enough to include horses. The Act is remedial, and there is no reason why the scienter should be proved where a dog bites a horse any more than where he bites an ox or a sheep. Why should not the Act apply to the case of a drove of ponies on a moor as much as to

(1) 28 & 29 Vict. c. 60, s. 1: "The owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner. Such damages shall be recoverable in any court of competent jurisdiction by the owner of such cattle or sheep killed or injured."

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a flock of sheep on a common? Cattle, in Webster's Dictionary, is stated, in its primary sense, to include "camels, horses, asses, all the varieties of domesticated horned beasts of the bovine genus, sheep of all kinds, goats, and perhaps swine."

Wills (*Blake Steele* with him), for the defendant. No doubt the word cattle is of large signification, and it may include camels and swine; the question, however, is whether cattle, in s. 1, includes horses. It is well known that the Act was passed with reference to sheep, and it is quite clear that cattle, in this section, does not include sheep, because sheep are mentioned: the words are, "cattle or sheep," so that the word cattle is not intended to be used in its large sense; the words cattle and sheep mean oxen and sheep. No doubt the Act is remedial, but it is also penal as to certain persons, and ought to be construed strictly.

LUSH, J. There are many Acts of Parliament which are encumbered with useless definitions, but in the present case a definition of the word "cattle" would have been beneficial, as it is difficult to say what may have been the intention of the legislature. In its primary sense, there is no doubt that cattle does include horses. I see nothing to exclude its application to horses, except that it is followed by the word sheep; cattle would include sheep, and this perhaps might imply that cattle is intended to be used in a limited sense. I am, however, of opinion that it includes horses, and is not intended to be confined to cows and oxen. It is a remedial Act, and horses are likely to be bitten by dogs. I have come to this conclusion without being quite satisfied that I know in what sense the legislature have used the word "cattle;" but I think that "cattle" includes horses.

HAYES, J. No good reason can be assigned for leaving out horses from the application of the statute. There is no reason to make an exception to the wide signification of the word "cattle." As I can find no reason to abridge the sense of the word, I am of opinion that "cattle" includes horses.

Judgment for the plaintiff.

Attorneys for plaintiff: *Bell, Broderick, & Co.*
Attorneys for defendant: *Gold & Son.*

THE QUEEN *v.* LORD NEWBOROUGH AND OTHERS.

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June 12.

Special Constables—Appointment and Payment of Special Constables—Form of Order on Treasurer—1 & 2 Wm. 4, c. 41, ss. 1 & 13—Certiorari—Practice.

By s. 1 of 1 & 2 Wm. 4, c. 41, justices are empowered to appoint special constables in the manner therein provided.

By s. 13 justices are empowered to order "at a special session to be held for that purpose" allowances to such special constables for their trouble, &c.; such order to be made on the treasurer of the county.

Special constables were appointed by justices for the county of C., but their appointment was not made in the manner pointed out by the Act. They acted, and an order on the county treasurer was made for payment for their trouble, &c., by justices then sitting for the purpose of auditing the accounts of the expenses of special constables after the business of an ordinary petty session had been concluded. No notice for the holding of any special session had been given.

The order was general in form, being a mere direction to pay, and it did not recite any of the facts which gave the justices jurisdiction to make it. The treasurer paid the amount, and the payment was afterwards allowed at quarter sessions:—

Held, that although the appointment of the special constables was not regular, and assuming that the order for their payment was originally invalid because not made at a special session held for the purpose, yet the Court, in the exercise of its discretion, would not grant a certiorari to bring up the order, as the proceedings were completely finished and no benefit could arise from re-opening them.

Semble, that the session at which the order was made was not "a special session held for the purpose," within s. 13 of 1 & 2 Wm. 4, c. 41, and that the order was, therefore, originally invalid.

Semble, that the order was sufficient in form.

RULE, calling on Lord Newborough, and two other justices for the county of Carnarvon, to shew cause why a writ of certiorari should not issue to remove into this Court an order under their hands, whereby the treasurer of the county of Carnarvon was ordered to pay the sum of 95*l.* 1*s.* 3*d.*, being the amount of certain allowances to, and expenses incurred in respect of, special constables.

In November, 1868, a number of special constables were appointed in the county of Carnarvon, by justices of the county, in apprehension of expected disturbances at the parliamentary elections which were then about to take place. Before the special constables were appointed, oath was made before the justices that tumult and riot might be reasonably apprehended, but the con-

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stables were not appointed by precept in writing under the hands of the justices, as required by s. 1 of 1 & 2 Wm. 4, c. 41.

The special constables subsequently acted, and on the 5th of December, 1868, the defendants, who were justices of the county of Carvarvon, and always act in and for the Carnarvon or chief petty sessional division of the county, held an ordinary petty session at Carnarvon, and after the business of such petty session had been concluded, they sat for the purpose of auditing the accounts for the expenses of special constables who had been called out to serve within that division. At this sitting they made an order for the payment of 95*l.* 1*s.* 3*d.* on account of allowances to, and expenses incurred in respect of, special constables. The order was signed by the three defendants. No notice had been given for the holding of any special session for the purpose of making such allowances.

The order was headed "County and Boroughs Election Bills, 1868," It was simply a list of items, commencing, "To Merionethshire constabulary, 16 men, 15*l.* 17*s.* 11*d.*," and amounting in the whole to 95*l.* 1*s.* 3*d.*, and was addressed "To the treasurer of the county. Pay the above 95*l.* 1*s.* 3*d.*"

The amount of this order was subsequently paid by the treasurer, and the allowances were distributed amongst the persons entitled.

On the 7th of January, 1869, this payment was allowed by the court of quarter sessions in the accounts of the treasurer, although two ratepayers then objected to such allowance and requested the Court to disallow the same.

The grounds upon which the rule was granted were: that the special constables had not been properly appointed under s. 1 of 1 & 2 Wm. 4, c. 41 (1); that the order had not been made at "a

(1) 1 & 2 Wm. 4, c. 41, s. 1, enacts, "where it shall be made to appear to any two or more justices . . . upon the oath of any credible witness that any tumult, riot, or felony has taken place, or may be reasonably apprehended in any parish, township, or place . . . and such justices shall be of opinion that the ordinary officers . . . are not sufficient for the preservation of the peace, &c., in any such parish, &c. . . . such justices . . . are hereby authorized to nominate and appoint by precept in writing under their hands so many as they shall think fit of the householders . . . to act as special constables," &c., &c.

special session held for that purpose" under s. 13 of 1 & 2 Wm. 4, c. 41 (1); that the order was bad in form, for not stating the facts which gave the justices jurisdiction to make it.

Maule, Q.C., and *McIntyre*, shewed cause. (2) A disturbance was apprehended in Carnarvon, and the justices, in the exercise of their discretion, appointed special constables. The Court will not now inquire whether the provisions of the statute have been observed with perfect accuracy. The order for the payment of the special constables was duly made at a "special session held for that purpose," because when the order was made the justices had concluded the business of the petty session, and were then sitting for the special purpose of auditing the accounts. This was, therefore, a special session held for the purpose of making these allowances. *Reg.* v. *Hamilton* (3) shews that an order of this sort for the expenses of special constables may be rightly made at a special session of the justices usually acting in the petty sessional division and need not be made at a special session of the whole body of justices for the county. The form of the order is correct, because it is not a judgment between parties in a contentious proceeding, but is a mere direction to the treasurer to pay a sum of money. No particular form is required for this purpose. Even if there have been some irregularities in the proceedings, the Court will not now reopen them. The maxim quod fieri non debuit factum valet applies to this case. The special constables were appointed, and have acted. An order for their payment was made which the treasurer obeyed, and his accounts have been allowed at the

(1) S. 13:—"The justices of the peace acting for the division or limits within which any such special constables shall have been called out to serve at a special session to be held for that purpose . . . are hereby empowered to order . . . such reasonable allowances for their trouble, loss of time, and expenses, to be paid to such special constables . . . as to the justices shall seem proper, and the said justices . . . may also order the payment of such expenses as may have been incurred in providing staves or other necessary articles for such special constables, and the said justices so ordering, if justices for any county, &c. . . . shall make every order for the payment of such allowances and expenses upon the treasurer of such county . . . who is hereby required to pay the same, and the said treasurer shall be allowed all such payments in his accounts."

(2) In the Bail Court, before Lush and Hayes, JJ.

(3) Law Rep. 3 Q. B. 718.

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quarter sessions, and he is discharged from all liability by s. 9 of 12 Geo. 2, c. 29. (1)

Poland, in support of the rule. The whole of the proceedings in this case have been illegal from beginning to end. As there is a mode of appointing special constables pointed out by s. 1 of 1 & 2 Wm. 4, c. 41, that mode of appointment must be followed. If it is not followed, no special constables are appointed, and there are no persons for whom the justices have jurisdiction to order payment. Even if special constables are properly appointed, the order for payment must be made "at a special session held for that purpose." The order in this case was not made in such a session, as the session was held without notice.

[LUSH, J. We think it is clear that the order was not made "at a special session held for that purpose."]

Then the order is void, and there is really no order at all. The order is also bad in form, as it should state those facts which alone can give jurisdiction to make the order. It should state that the justices who made it were sitting at a special session as required by the Act; that 95*l.* 1*s.* 3*d.* was a reasonable allowance; that the constables had been properly appointed, &c., &c. All these facts should appear on the face of the order. The order being void, both on account of its not being made at a special session and on account of its form, the treasurer ought not to have paid it, and its allowance at quarter sessions can have no effect.

LUSH, J. I think it would be a bad precedent, and we should be doing a mischievous act if we made this rule absolute. The first question is, as to the validity of the appointment of the special constables. I am far from agreeing with the argument that if the appointment was bad the whole of the subsequent proceedings are void; I am not prepared to say that after these constables had acted they would be liable to be sued as if they had received no appointment at all. Even if the provisions of the statute (1 & 2 Wm. 4, c. 41) were not followed, it is clear that the

(1) 12 Geo. 2, c. 29, s. 9, enacts that the discharges of justices at their general or quarter sessions to treasurers "shall be deemed and allowed as good and sufficient releases, acquittances, or discharges in any court of law or equity to all intents and purposes whatsoever."

magistrates were informed upon oath that tumult and riot might be reasonably apprehended. On this information they acted, whether the constables were appointed by writing or not, and we are not inclined to do any act which may imperil the position of the constables.

The second question is, whether the order is good in point of form. It is not necessary to express an opinion upon this point, but I see no objection to its form. It is not necessary that the form of an order like this should be the same as in a contentious proceeding, where there is a judgment between two parties. This is a mere direction to the treasurer; the form is general, but I think that it is a sufficient direction to the treasurer to pay.

It appears that the order was not made at a special session, and I think that the order is on that account invalid. Mr. Poland is entitled to any benefit that may be derived from this expression of opinion. If any question arose as to the validity of the order, I should hold it to be invalid, as not having been made at a special session. The reason for the provision requiring such orders to be made at a special session, is obvious, viz. to give notice to all the justices of the division that they may have an opportunity of attending when the order is made. If the order had not been acted on, a different question might have arisen. But it was acted on. It was made in December, and the money was paid immediately and distributed amongst the constables who had been employed. The account was allowed at quarter sessions in January. As the account has been allowed, the treasurer is justified by the terms of the statute (12 Geo. 2, c. 29, s. 9). He might have been liable if the account had not been allowed, and the order did not appear to have been properly made. As it is, however, the allowance of the account discharges the treasurer absolutely by 12 Geo. 2, and no question can arise about this now.

It is in the discretion of the Court to grant or to refuse a certiorari, and it is not a matter of right. As the order has been acted on, the money paid, and the account allowed, we think we ought not to do anything to re-open these proceedings. If Mr. Poland's argument is right, and the whole proceedings are void, we do not affect the matter by our decision.

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HAYES, J., concurred on the same grounds.

Rule discharged.

Attorney for applicant: *E. Byrne.*

Attorneys for defendants: *Bloxam, Ellison, & Bloxam, for W. J. Poole, Carnarvon.*

July 3.

DENSTON, ASSIGNEE, &c., *v.* ASHTON AND OTHERS.

Practice—Costs, Security for—Assignee suing for benefit of Creditors—Insolvent.

The Court will not require security for costs to be given by a plaintiff who sues as the assignee of a bankrupt for the benefit of the estate, although he is in insolvent circumstances.

THIS was an action of ejectment brought by the plaintiff as creditors' assignee of Hawgood, a bankrupt, to recover possession of certain premises which were in the occupation of Hawgood at the time he became bankrupt.

A summons had been taken out on the 28th of May, by the defendants, calling upon the plaintiff to shew cause why he should not forthwith give security for the defendants' costs, to the satisfaction of the master. The summons was heard before Master Hodgson, who endorsed "no order" upon the summons.

An appeal from the master's decision was, on the 6th of June, heard before Willes, J., who, on the 8th of June, made an order that the plaintiff give security for costs to the satisfaction of the master. The plaintiff, being dissatisfied with this order, took out a summons calling on the defendants to shew cause why the order of Willes, J., should not be rescinded. The summons was heard before Blackburn, J., who endorsed the summons "no order," without prejudice to any application to Willes, J. A similar summons was then taken out and heard by Willes, J., but he declined to rescind his former order.

There were conflicting statements on the affidavits as to whether the plaintiff was in insolvent circumstances and unable to pay the defendants' costs in the event of not succeeding in the action.

A rule was afterwards obtained calling on the defendants to

shew cause why the order of Willes, J., dated the 8th of June, should not be rescinded.

April 22. *M. Bere* shewed cause.

Day supported the rule.

The arguments and the cases cited sufficiently appear in the judgment of the Court.

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Hannen and Hayes, JJ.) was delivered by

HAYES, J. This was a rule obtained to set aside an order of Willes, J., requiring the plaintiff to give security for costs in the action, which was ejectment by the plaintiff as assignee of one Hawgood, a bankrupt, to recover some premises formerly occupied by the bankrupt, and claimed by the plaintiff for the benefit of the estate. The order had been made on the ground of the plaintiff's poverty and alleged inability to pay costs if he failed, and because he was suing not for his own benefit, but for that of the creditors.

The case was argued in Easter Term last, when cause was shewn against the rule by Mr. Bere on the part of the defendants, and the rule was supported by Mr. Day on the part of the plaintiff.

On the part of the defendants reliance was placed on the general rule for requiring security for costs in the case of an insolvent who is suing as a mere nominal plaintiff for the benefit of a third person, and the cases of *Perkins* v. *Adcock* (1); *Elliot* v. *Kendrick* (2), and *Goatley* v. *Emmart* (3) were cited.

On the other hand it was contended by Mr. Day that the case was distinguishable from the cases cited and withdrawn from the ordinary rule, on the ground that the plaintiff had as assignee a duty to collect the assets for the benefit of the estate, and that there was no instance in such a case of requiring security for costs which might obstruct him in the performance of his duty and prevent the assets from being collected. We took time to consider the case, and being unable to find any authority in favour of en-

(1) 14 M. & W. 808. (2) 12 Ad. & E. 597.
(3) 15 C. B. 291; 24 L. J. (C.P.) 38.

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forcing security for costs in such a case, we were disposed against requiring it in the present instance.

Very recently the subject has been before the Court of Common Pleas in the case of *Sykes* v. *Sykes* (1), in which the plaintiffs sued as executors for an injury to the assets of the estate, and on an application by the defendant security for costs had been ordered to be given by Brett, J., on the ground that one of the plaintiffs resided in Scotland, out of the jurisdiction of the Court, and the other had become bankrupt and was unable to pay costs. And the Court, who considered the case of an executor to stand on the same footing as assignees, in regard to the duty of collecting the assets of the estate, held that the circumstances afforded no ground for requiring security, and rescinded the order. This decision entirely agrees with our opinion, and, therefore, we think that the rule should be made absolute.

Rule absolute.

Attorney for plaintiff: *Harper.*

Attorney for defendants: *Richard Jones.*

June 5.

THE GUARDIANS OF THE MACHYNLLETH UNION, APPELLANTS; THE OVERSEERS OF THE LOWER DIVISION OF THE PARISH OF POOL, RESPONDENTS.

Poor—Irremoveability of Pauper—"Union"—4 & 5 Wm. 4, c. 76, s. 109—24 & 25 Vict. c. 55, ss. 1, 12.

By 9 & 10 Vict. c. 66, s. 1, no person shall be removed from any parish in which he shall have resided for five years. By 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8, residence in any part of a union is to have the same effect as a residence in a parish, and the period of residence is reduced to one year.

By s. 12 of 24 & 25 Vict. c. 55, the words used in that Act are to be construed as in 4 & 5 Wm. 4, c. 76; and by s. 109 of the latter Act "union" is to include, amongst others, "any number of parishes incorporated for the relief or maintenance of the poor under any local Act."

By a local Act certain townships, each separately maintaining its own poor, and several parishes were incorporated into a united district for the purpose of maintaining a house of industry for the poor of the whole district, under a board of directors. Each parish or township had the separate care of, and paid for the maintenance of, its own poor in the house, under the management of the directors; but each contributed according to a fixed proportion to the general costs

(1) Law Rep. 4 C. P. 645.

of the maintenance of the house. The outdoor relief was left in the hands of the parish officers:—

Held, that the united district was a union within the meaning of 24 & 25 Vict. c. 55, s. 1, and 5 & 6 Wm. 4, c. 76, s. 109; and that an aggregate residence of one year in two of the townships rendered a pauper irremoveable.

CASE stated, after notice of appeal, under 12 & 13 Vict. c. 45, s. 11.

1. By an order of justices, dated the 11th of January, 1867, George Rowland and three other persons were ordered to be removed from the lower division of the parish of Welchpool to the parish of Penegoes, in the Machynlleth Union, as the place of their last legal settlement. Notice of appeal was duly given against the order, and the ground of such appeal was, that the paupers were irremoveable from the respondent parish, because they had resided there and in other parts of the union in which such parish is situate and of which it forms a part, for more than a year next before the making of the order.

2. The lower division of the parish of Pool, or Welchpool, as it is sometimes called, is a township or place separately maintaining its own poor, and the two other divisions of the parish, namely, the middle and the upper divisions of Pool, also separately maintain their poor, but neither division aids or contributes to the relief of the other townships or divisions, and each division has its own churchwardens and overseers, makes its own assessments, and raises its own rates as provided by a local Act.

3. By 6 Geo. 4, c. cxxiii., intituled "An Act to repeal two Acts, respectively of the 22 & 26 Geo. 3, for the better relief and employment of the poor of the Montgomery and Pool United District, and to provide new powers and regulations in lieu thereof," the parish of Pool and a number of other parishes and townships were to continue and remain one "incorporated, entire, and united district" for the purposes of this Act, and to be called "The Montgomery and Pool United District." This Act is administered within the district by the guardians and directors of the united district, who are by the Act defined to be all persons residing within that district, and possessing certain qualifications therein set forth, and are to be a corporate body.

4. By s. 2, the corporation of guardians were to hold a certain

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house of industry established under former local Acts, and called "The Montgomery and Pool House of Industry."

5. By s. 9 it is declared that twenty-four of the most able and discreet guardians shall be elected directors of the united district.

6. By s. 28 it is declared that the directors shall form committees, and make standing rules and orders, as well for the regulation of themselves and officers as for the governance and regulation of the house of industry and the poor therein, and to repeal, alter, or amend the same as to the directors shall seem expedient.

7. By s. 38 the directors were, without delay, to ascertain the respective places of settlement within the united district of all poor persons in the house of industry, and to deliver to the overseers of each place in the district a list or account of such of the persons whose settlements should be found to be in such place, or who were brought to or received into the house from or in respect of such place, and further provisions were made for allotting each of any poor persons as to whose settlement there should be a difficulty to one or other of the parishes or places within the district.

8. Section 39 of the Act is as follows: "From and after the 1st day of October, 1825, each parish or other place within the said united district shall have their separate and distinct care of the poor belonging or who shall hereafter belong thereto, or who was, or were, or shall be sent to or received into the said house of industry from or in respect of such place, or be so allotted as aforesaid, and shall maintain or provide for them at the separate expense of such place, either in the said house of industry by virtue of this Act, or elsewhere, pursuant to the general laws relating to the poor and this Act, with power, nevertheless, to remove by the usual means such of them whose settlements may happen to be elsewhere than in such place to the place or respective places of his, her, or their settlement."

9. Section 40 is as follows: "It shall be lawful for the vestry, or, in case of immediate necessity, for the overseers, or other officers or persons having by law the care, management, or direction of the poor of a parish or place within the said united district, from time to time to take or send any poor person or persons chargeable thereto to the said house of industry, with or without suitable clothing, by writing signed by the vestry clerk or a direc-

tor or overseer of the poor appointed for or in respect of the same parish or place; and such poor person or persons shall be thereupon received into the said house, and there provided for under the provisions of this Act. And that it shall be lawful for such vestry, overseers, or other officers or persons having such management or direction as aforesaid, by writing signed in like manner, at any time or times, to require the discharge of any of the said poor persons who now is or are or shall be in the said house of industry belonging to such parish or other place, or from or in respect of which such writing shall be sent, and such person or persons shall be thereupon discharged accordingly, suitably clothed, and shall be taken and removed by such overseer or other officer of such parish or place from the said house, either back to the same parish or place, or to the place or respective places of his, or her, or their settlement."

10. By ss. 41 and 42, persons afflicted with insanity or with contagious disorders, were to be, or might be, removed from the said house of industry, and provisions are made for defining the parish or place the overseers whereof shall be bound to make such removal.

11. The house of industry was vested in the guardians of the united district (s. 2). The poor in the house are under the entire care, control, and management of the directors of the poor of the Montgomery and Pool United District (s. 43); but their relief is charged to and paid by the respective parishes to which they belong (s. 47), as is also the outdoor relief which is entirely under the control of the overseers of the respective parishes, and not of the board of directors. The directors are elected as provided by s. 15 of the Act.

12. Section 43 is as follows: "The said directors for the time being shall have, and they are hereby vested with, the entire care, control, management and government of the said house of industry, and of all the poor who now are, or shall at any time be received therein, until lawfully discharged therefrom, with power to provide for their better maintenance and employment there; and shall from time to time for ever set and keep them to work and maintain and provide for them during their respective continuance in the said house in such manner as overseers of the poor are empowered and

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required to do in any poorhouse, workhouse, or elsewhere, by any law now being, or which shall hereafter be enacted, relating to the poor, or in such other legal manner as the said directors, or any three of them shall think proper, subject to the provisions of this Act, and to the rules, orders, and regulations to be made by virtue hereof."

13. Section 76 is as follows: "This Act shall be deemed adjudged and taken to be a public Act, and be judicially noticed as such by all judges, justices, and other persons without being specially pleaded."

14. The fund for paying the general expenses of the corporation is raised as pointed out by ss. 47 and 48, the former of which declares that such poor persons as shall be thereafter sent to the said house of industry, shall, during the time they remain therein, be lodged, clothed, maintained, and provided for by the directors at the costs of the respective parishes and other places in the said united district to which they shall respectively belong, or from or in respect of which they shall respectively be received into the said house; and by s. 48 it is provided that the general expenses of the maintenance and management of the house of industry shall be paid by the several parishes and places within the district in certain fixed proportions according to a schedule given. In the schedule the lower middle and upper divisions of the parish of Pool appear separately, and a different proportion is fixed for the contribution of each towards the common fund.

15. By s. 49, the directors are to issue warrants to the overseers of the respective places in the district, requiring them to raise the required contributions, and such overseers are to pay the same amounts out of the poors rates for their respective parishes or places.

16. The corporation have no common fund other than that referred to in ss. 47, 48, and 49, and the directors and guardians have no power whatever to raise any funds except under these sections.

17. The paupers and their mother, who is a widow, had immediately before the 3rd of February, 1866, resided in the middle division of the parish of Pool for several years, and were irremoveable therefrom by reason of 9 & 10 Vict. c. 66; on that day they

removed from that township to the lower division of the parish; where the paupers have continued to reside up to the time when the order was made, and the mother continued to reside there until she was sent to prison where she now is.

18. The paupers are removeable from the lower division of the parish, if their residence there and that of their mother is alone to be considered.

19. The appellants contend that the paupers' residence in the middle division of Pool may be joined with their residence in the lower division, and that they are irremoveable from the latter place, because they have resided for one year or upwards in one or more parishes forming part of the united district, which it is contended is a "union" within the meaning of 24 & 25 Vict. c. 55, s. 1. (1)

20. The respondents contend that the Montgomery and Pool United District is not a poor law union contemplated by that Act, and that the duties of the directors are confined solely to the internal management of the house and of the poor who may be therein, and that the directors have no common fund at their disposal, nor have they the means of raising any out of which paupers can be supported.

21. The respondents admit that, if the residence in different parishes which form part of the united district may be joined together, the paupers are irremoveable.

(1) By 9 & 10 Vict. c. 66, s. 1:— "No person shall be removed, nor shall any warrant be granted for the removal of any person, from any parish in which such person shall have resided for five years next before the application for the warrant. . ."

By 24 & 25 Vict. c. 55, s. 1, after the 25th of March, 1862, "The period of three years shall be substituted for that of five years specified in s. 1 of 9 & 10 Vict. c. 66, and the residence of a person in any part of a union shall have the same effect in reference to the provisions of the said section as a residence in any parish."

By 28 & 29 Vict. c. 79, s. 8, after the 25th of March, 1866, the period of one year shall be substituted for that of three years specified in s. 1 of 24 & 25 Vict. c. 55.

By 24 & 25 Vict. c. 55, s. 12, the words used in that Act are to be construed in like manner as in 4 & 5 Wm. 4, c. 76. By s. 109 of the latter Act, "'union' shall be construed to include any number of parishes united for any purpose whatever under the provisions of this Act; or incorporated under 22 Geo. 3, c. 83, intituled, 'An Act for the better Relief and Employment of the Poor;' or incorporated for the relief or maintenance of the poor under any local Act."

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The question for the opinion of the Court was, whether the paupers were irremoveable from the lower division of Pool.

Poland, for the appellants. By 9 & 10 Vict. c. 66, s. 1, a person, who had resided in a parish for five years next before the application for the warrant of removal, acquired a status of irremoveability in that parish. By 24 & 25 Vict. c. 55, s. 1, the residence of a pauper for three years and in any part of a union enabled him to acquire a status of irremoveability; and by 28 & 29 Vict. c. 79, s. 8, one year is substituted for three years. The question is, whether the residence of the paupers in the middle division of Pool can be united with the residence in the lower division as a residence within a union. This depends upon whether the incorporated district, formed of these parishes and townships by the local Act (6 Geo. 4, c. cxxiii.), is a union within the meaning of s. 1 of 24 & 25 Vict. c. 55. Now, by s. 12 of that Act, the words used in that Act are to be construed in like manner as in 4 & 5 Wm. 4, c. 76; and by s. 109 of the latter Act, "'Union' shall be construed to include any number of parishes united for any purpose whatever under the provisions of this Act; or incorporated under 22 Geo. 3, c. 83; or incorporated for the relief or maintenance of the poor under any local Act." This last definition applies to the present case, for it can hardly be contended that these parishes and townships are not incorporated for the relief or maintenance of the poor. The poor in the house of industry are in the entire control of the directors, although it must be admitted they are not supported out of a general fund, but by each parish to which they belong (ss. 43 and 47, parr. 12 and 14). That cannot make any difference; nor that the poor out of the house are under the care of the overseers of the respective parishes. The whole Act has for its object "the better relief and employment of the poor" which is its title, as well as the title to 22 Geo. 3, c. 83. *Leatham* v. *Bolton Le Sands* (1), was decided on the language of s. 97 of 16 & 17 Vict. c. 97, and has no application to the present case.

McIntyre, for the respondents. This is not a union within the meaning of 24 & 25 Vict. c. 55, s. 1, and 4 & 5 Wm. 4, c. 76, s. 109.

(1) 6 B. & S. 547; 35 L. J. (M.C.) 62.

There is no common fund out of which the paupers are supported; each parish or township supports its own paupers. These parishes are joined together merely for the purpose of maintaining a house of industry, and there is a common fund only for the purpose of supporting the general expenses of the house. Section 1 of 24 & 25 Vict. c. 55, must be read in conjunction with s. 9; and it will be seen that the object of that Act was to make chargeability and removeability co-extensive. The intention was, that all the paupers residing in the union should be supported out of a common fund, contributed by the parishes forming the union, in proportion to the amount of rateable property in each parish. It therefore made no difference whether the pauper gained a status of irremoveability by residing a whole year in one parish, or by uniting a lesser period of residence in several parishes of the same union. But where each parish supports its own paupers there would be great hardship in holding that the same rule applies. In *Reg.* v. *Northwich* (1), the Union Chargeability Act (28 & 29 Vict. c. 79) was held to apply only to a union formed under 4 & 5 Wm. 4 c. 76, s. 26.

Poland, was not heard in reply.

COCKBURN, C.J. I am of opinion that the paupers were irremoveable. The question turns on the meaning of the word "union," as used in 24 & 25 Vict. c. 55. We all know that in former times great hardship and great cruelty were sometimes inflicted on paupers from their being torn away from places in which they had long resided and in which there were certain associations attaching them to the neighbourhood, and being taken away to some place of settlement which they had not perhaps ever seen; for they were very often removed to places where they had only a settlement by parentage. The legislature proceeded to remedy that, by enacting that a residence in a parish for a certain time should constitute irremoveability; and that, if poor persons became chargeable in a parish where they had long resided, they should be entitled to be left there in peace. That very wise and humane legislation has been extended and improved by being made applicable to several parishes united in a union. The extension of that principle to a union ought, perhaps, in justice,

(1) Law Rep. 2 Q. B. 383.

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to be limited to a union in which, as unions are generally constituted, every parish contributes, not according to the number of its poor chargeable on the union, but according to the amount of rateable property in the parish; and the whole union being treated as an entire district, it matters not whether paupers come from parish A. or parish B., as they are relievable out of the common fund. That would, perhaps, have been the most satisfactory footing on which to put this legislation, but I do not think that is what the legislature have done They have, in 24 & 25 Vict. c. 55, s. 1, used the term "union," and by s. 12, the words used in that Act are to be interpreted as in the Poor Law Amendment Act (4 & 5 Wm. 4, c. 76), and by s. 109 of the latter Act "the word 'union' shall be construed to include any number of parishes united for any purpose whatever under the provisions of this Act, or incorporated under the 22 Geo. 3, c. 83, intituled, 'An Act for the better Relief and Employment of the Poor' (Gilbert's Act), or incorporated for the relief or maintenance of the poor under any local Act." Therefore there are three things to which the word "union" is applicable: a union as constituted under the Poor Law Amendment Act itself, or under Gilbert's Act, or an incorporation of several parishes for the relief or maintenance of the poor under any local Act. The reference to Gilbert's Act shews that "union" is not confined to the cases where the whole of the parishes of a district are united into a union for the maintenance of the poor, and have a common purse formed out of the contributions of each parish according to the amount of rateable property in each; for under that Act each parish contributes according to the average expenses of its paupers (1). But there is another and stronger ground for saying that we must consider this particular instance as falling within the third branch of the definition in the Poor Law Amendment Act. Though I attach considerable importance to the title given to Gilbert's Act, "An Act for the better Relief and Employment of the Poor," which are precisely the terms used in the title of this local Act, it is clear that "union" was not intended to be confined to unions under Gilbert's Act, because the interpretation clause goes on to say, "Any other corporation for the relief or maintenance of the

(1) See 22 Geo. 3, c. 83, s. 24.

poor under any local Act." Now let us see with what object this local Act was passed. Its objects are the same as Gilbert's Act, with one trifling exception, viz., that although the purpose of both statutes was to put an end to out-door relief and bring pauperism within the walls of the poor-houses, yet, as regards out-door relief, that is left by the local Act in the hands of the parish officers. I think it impossible, looking at the whole scope of this local Act, to say it is other than an Act for the relief or maintenance of the poor, or an Act for the union of parishes to be incorporated for the relief or maintenance of the poor. The local Act alters the system of management under the statute of Elizabeth, and establishes a form of government partly by directors and partly by parish officers; and the united district comes within the last definition of "union" given in the Poor Law Amendment Act; and I must, therefore, hold that this combination of townships and parishes is a "union," and that these paupers were irremoveable, and therefore that the order of removal was bad.

MELLOR, J. The object of this legislation was to keep paupers from being arbitrarily removed from districts where they have resided some time. It is admitted, that if this united district were an ordinary union the paupers would have been irremoveable. Is the paupers' condition to be made worse in this respect merely because the burthen of their maintenance happens to be cast on each parish? No doubt, when the burthen is general on all the parishes of a union the equity of the enactment may be more complete; but when this is not the case, the condition of the paupers ought not to be made worse. It is desirable that there should be uniformity; and I am therefore of opinion that judgment on this appeal should be given for the appellants.

LUSH, and HAYES, JJ., concurred.

Judgment for the appellants.

Attorney for appellants: *Price, Bolton, & Filder.*
Attorneys for respondents: *Gregory, Rowcliffes, & Rawle.*

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July 3.

FARRER, APPELLANT; CLOSE, RESPONDENT.

Friendly Society—Enforcing Rules—Trade Union, Illegality of—18 & 19 *Vict. c.* 63, *ss.* 9, 24, 44.

1 C.C.R. 239
7 B.&S. 745

Information under ss. 24 and 44 of 18 & 19 Vict. c. 63, against an officer of a friendly society at Bradford, charging him with having misappropriated 40*l.* of the money of the society.

Most of the rules of the society were legitimate rules of a friendly society; but rule 18, s. 6, was: "Any officer being discharged from employment for holding office, if he sign the vacant book each day, shall be paid at the rate of wages he was receiving when discharged, such remuneration to continue till he receive employment." Sect. 7: "Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council shall be entitled to the sum of 15*s.* per week." Sect. 9: "Any member refusing work from private objections, unless he can shew sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed." Rule 25, s. 2: "In the event of an application to the executive committee from other trades for assistance, the general society shall obtain information respecting the same, and on the executive committee being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds warrants, or the case may, in their opinion, deserve." Rule 31, s. 1: "There shall be an equalization every twelve months (ending with the last meeting night in December) of that portion of the funds of the society which has not been personally invested, such equalization to be in proportion to the number of members in each branch." It was stated in evidence by one of the members: "In case of sickness 12*s.* per week is allowed; when drawn out of shop, or turned off for being member of society, full wages or 15*s.* is allowed. In case of long strike at a particular place, and funds exhausted, the members would not contribute, except annually to an equalization fund. We have monthly reports. Strikes are reported. Members of our society would not be allowed to go to places where there are strikes if we can prevent them. We would give a member 2*l.* or 3*l.* to send him somewhere else. If he were out of work at Bradford, rather than a man should go to Keighley (if a strike was on), we would grant money to send him a thousand miles another way. We can pay this money at our discretion. We would send men to Halifax or Leeds, pay their railway fares, and keep them on, if it should be a case satisfactory to the branch. The executive council can give money to strikes on any trade. Any sensible man can see from our monthly report where there are strikes, and where to avoid. If I am on strike, or we draw men out, and money is paid to me or them by the society, all such payments are trade privileges, and justified by the rules. Our society has nothing to do with ordering work to be done by the piece."

The justices dismissed the information, on the ground that the rules of the society, as shewn by the evidence, were illegal and in restraint of trade, and that the society was not within 18 & 19 Vict. c. 63, s. 44:—

Held, by Cockburn, C.J., and Mellor, J., that the evidence shewed that the rules, in practice, are applied so as to render the funds of the society available for

the purpose of supporting strikes, by allowing sums of money to workmen wanting employ, in order to prevent them from seeking work in districts where men are on strike, and also by giving assistance to other branch associations in whose districts strikes are going on; that these purposes are not of a friendly society, but of a trade union, and such as are illegal as being in restraint of trade, according to *Hornby* v. *Close* (Law Rep. 2 Q. B. 153); and that the justices were right.

By Hannen and Hayes, JJ., that strikes are not necessarily illegal; and that there was nothing in the evidence to shew that the funds of the society had ever been applied to the support of illegal strikes; that no obligations in restraint of trade were imposed by the rules, and that the society was not shewn to be established for an illegal purpose; and that the decision of the justices was wrong.

CASE stated by justices under 20 & 21 Vict. c. 43.

An information was laid by the appellant against the respondent, that, on the 28th of January, 1867, at Bradford, the respondent, then being an officer of a friendly society, to wit, the secretary of the Amalgamated Society of Carpenters and Joiners, did then and there have in his possession the sum of 40*l.* belonging to the society, and hath wilfully misappropriated the same, contrary, &c.

The justices, though they were most decidedly of opinion that the case, as laid in the information against the respondent, was fully proved, and that there was no doubt about the guilt of the respondent, dismissed the charge, on the ground that the rules of the society, as shewn by the evidence adduced before them, were in restraint of trade.

The respondent contended that the society was not a society within s. 44 of 18 & 19 Vict. c. 63 (1), and, further, that it was a

(1) 18 & 19 Vict. c. 63, s. 9, makes it lawful for any number of persons to establish a friendly society for raising voluntary subscriptions of the members. "1. For insuring a sum to be paid on the birth of a member's child, or on the death of a member, or for the funeral expenses of the wife or child of a member. 2. For the relief or maintenance of members, their husbands, wives, children, brothers or sisters, nephews or nieces, in old age, sickness, or widowhood, . . ." provided the rules of the society be certified by the registrar.

By s. 24. If any officer or member having money of such society in his possession shall misapply the same, jurisdiction is given to two justices to hear the complaint, as under 11 & 12 Vict. c. 43, and adjudicate upon it.

S. 44. "In the case of any friendly society established for any of the purposes mentioned in s. 9, or for any purpose which is not illegal, having written or printed rules, whose rules have not been certified by the registrar, provided a copy of such rules shall have been deposited with the registrar," every dispute between any member and an officer, &c., of such society shall be decided as in the Act mentioned, and also s. 24 shall be applicable to such uncertified societies.

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society established for purposes which are illegal, being against public policy in restraint of trade; that the society was an organization for, or tending to, the encouraging and maintaining of strikes.

In support of his arguments and objections the respondent's attorney called attention to the following rules:—

"Rule 18, s. 6. Any officer being discharged from employment for holding office, if he sign the vacant book each day, he shall be paid at the rate of wages he was receiving when discharged, such remuneration to continue till he receive employment."

"Sect. 7. Any free or non-free member or members, leaving his or their employment under circumstances satisfactory to the branch or executive council, shall be entitled to the sum of 15*s.* per week."

"Sect. 9. Any member refusing work from private objections, unless he can shew sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed."

"Rule 25, s. 2. In the event of an application to the E. C. [Executive Committee] from other trades for assistance, the G. S. [General Society] shall obtain information respecting the same, and on the E. C. being satisfied as to the genuineness of the case shall grant such assistance as the state of the funds warrants or the case may in their opinion deserve."

"Rule 31, s. 1. There shall be an equalization every twelve months (ending with the last meeting night in December) of that portion of the funds of the society which has not been personally invested, such equalization to be in proportion to the number of members in each branch." (1)

The justices subjoined the evidence given on the hearing of the case, of which the following parts are material:—

JAMES BROWN, treasurer of the society, in cross-examination, stated: I have been nearly four years a member of the society. . . . There has not been a strike in this district. There have been strikes in other districts, where trade privileges are. We have sent money to other districts for benevolent purposes—donations of trade. We have not sent money to men who had left work for too low wages. We have sent money to other societies.

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(1) A copy of the rules was attached to the case; and they were all (with the exception of those set out in the case), admittedly, legitimate rules of a friendly society. See the judgment of Hannen, J., post p. 609.

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Re-examined. We do not impose any restrictions on hours of labour, or price of labour.

GEORGE FARRER stated: I am a member of the society . . .

Cross-examined. I was president in January, 1867. I had been vice-president before. I have been a member since the 29th of July, 1865. I had not been a member of a carpenters society before that time. We have not discussed prices or hours of labour at those meetings, nor at any special meetings. I set my own price on my own labour. There has been no society's price. There are several societies in the town; some have number of hours of labour fixed. That is an arrangement between masters and men. If masters or men do not observe rules, in either case notice is sent to the masters' or men's association. Suppose masters' associations censured by any master offending, the men might be drawn away from that shop, and paid by our society. In case of sickness 12*s.* per week is allowed. When drawn out of shop or turned off for being member of society full wages or 15*s.* is allowed. In case twenty men drawn out and any went back, the society would take no steps. We correspond with branch associations in other towns. In case of a strike at Devonport we should not consider the propriety of whether we should send or not if the branch committee, with the sanction of the executive committee, had approved of a donation being sent. In case of long strike there and funds exhausted, we should not contribute except annually to an equalization fund. We only consider subjects which affect our own Bradford branch. I do not know what money has been paid out of our society to any other society. We have monthly reports. Strikes are reported. Members of our society would not be allowed to go to places where there are strikes if we can prevent them. We would give a member 2*l.* or 3*l.* to send him somewhere else, i.e., if he were out of work at Bradford, rather than a man should go to Keighley (if a strike was on) we would grant money to send him away a thousand miles another way. We can pay this money at our own discretion. We would send men to Halifax or Leeds, pay their railway fares, and keep them on, if it should be a case satisfactory to the branch. I do not know nor never heard a word about money being given to plasterers. We have given to executive council 40*l.* or 50*l.* in two or three years. The executive council consider appeals if they come from other quarters. They send a remittance to branch carpenters associations. They have also considered appeals from other trades. It may be to assist men on strike. The executive council can give money to strikes on any trades. Any sensible man can see from monthly report where there are strikes and where to avoid. In the quarterly report trade privileges are mentioned. Wilson's men lost tools by fire; we bought them new tools. If I am out on strike, or we draw men out, and money is passed to me or them by the society, all such payments are trade privileges, and justified by the rules of the society.

Our society has nothing to do with ordering work to be done by piece.

Re-examined. We have members working at all prices, from 1*l.* 1*s.* a week to 27*s.* or 28*s.* The society did agitate about the number of hours. Any member may work as he likes. The reports are furnished by the executive council. I have been dismissed for being a member of this society. I got work the day after. I am an employer now. I have been so for five months. Nothing has been done under these rules, in my opinion, in restraint of trade, or I would not remain a member of it.

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In the report of 1866 30*l.* is stated to be given to the Sheffield file-cutters who were locked out.

The question for the opinion of Court was, whether the determination of the justices, upon the facts and grounds stated in the case or contained in the evidence annexed, was or was not erroneous in point of law.

Jan. 16. *Quain, Q.C.*, for the appellant, contended that the rules were not illegal, and that the society was a friendly society within 18 & 19 Vict. c. 63, and that the decision of the justices was erroneous.

The respondent did not appear.

Cur. adv. vult.

July 3. The following judgments were delivered:—

COCKBURN, C.J. The only question in this case is whether a certain society, called "The Amalgamated Society of Carpenters and Joiners," is essentially a friendly society, properly so called, so as to be within the protection of 18 & 19 Vict. c. 63, ss. 24 and 44, or whether, though established as a friendly society, it does not so far partake of the character of a trades union as to fall within the principle of the decision of this Court in *Hornby* v. *Close*. (1)

The question turns on the construction to be put on certain of the rules of the society, viz. rule 18, ss. 6, 7, and 9, rule 25, s. 2, and rule 31, s. 1; more especially on s. 7 of rule 18. The latter section is in these terms: "Any free or non-free member or members, leaving his or their employment under circumstances satisfactory to the branch or executive council, shall be entitled to the sum of 15*s.* per week."

It was urged upon us, on the argument, that the rules in question, including rule 18, s. 7, admitted of a perfectly innocent construction, and were capable of being applied to purposes only which were within the scope of the object of a friendly society; and that, as the society professed to be a friendly society, and was established

(1) Law Rep. 2 Q. B. 153.

as such, the rules ought to receive such a construction as would make them consistent with that character.

We should be disposed to concur in this view, if there were nothing to show that the rules in question had not, in their practical application by the society, been made subservient to the purposes of a trades union instead of being confined to those of a friendly society. But on referring to the facts as established by the evidence, more especially that of the witness George Farrer, who had filled the offices of president and vice-president of the society, and who is the appellant in this case, we clearly see,—agreeing herein with the view taken by the justices,—that the rules in question are, in practice, so construed and applied as to render the funds of the society available for the purpose of supporting strikes, by allowing sums of money to workmen wanting employ, in order to prevent them from seeking work in districts where men are on strike, and also by giving assistance to other branch associations in whose districts strikes are going on. Such is the general effect of the evidence of the witness Farrer. I would particularly refer to the following passage, "Strikes are reported. Members of our society would not be allowed to go to places where there are strikes if we can prevent them. We would give a member 2*l.* or 3*l.* to send him somewhere else, i.e., if he were out of work at Bradford, rather than a man should go to Keighley (if a strike was on) we would grant money to send him away a thousand miles another way. We can pay this money at our discretion. We could send men to Halifax or Leeds, pay their railway fares, and keep them on, if it should be a case satisfactory to the branch."

Now these are, clearly as it seems to me, purposes, not of a friendly society, but of a trades union, and such as would be illegal as being in restraint of trade, so that the case would clearly fall within the decision in *Hornby* v. *Close* (1), if the illegal purpose had been explicitly avowed in the rules.

It is true that in the present case the rules are ambiguous; but I think we are bound to look not only to the rules themselves, but also to the conduct and operations of the society; and that we must treat the society, not according to what it professes to be, but

(1) Law Rep. 2 Q. B. 153.

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according to what it practically is. Otherwise, a society by framing its rules ambiguously, so as to be capable of being applied to carry out the purposes of a friendly society or those of a trades union, might, while carrying on its operations as a trades union, evade the law, and obtain the advantages secured by statute to a friendly society and which would be refused to it, if its true character were avowed. Such a result sufficiently shews that it is to the actual working of the society, and not to its ostensible character, that we must look. And in this case I am satisfied that the society, though in the main a friendly society, is, with reference to some of its objects, practically a trades union.

I am therefore of opinion that the case comes within the principle of the decision in *Hornby* v. *Close*. (1) We are not called upon to consider the principle on which that decision proceeded; namely, that a society, one of the purposes of which is the support of members when on strike, is illegal within the meaning of s. 44 of 18 & 19 Vict. c. 63, as being in restraint of trade; and that, consequently, the society is not entitled to the advantages secured to a friendly society by that Act, but in case of any misappropriation of its funds must be left to its ordinary legal remedies. Nor is it necessary to discuss the policy of the law which holds contracts which are in restraint of trade to be illegal, or to pronounce any opinion on the expediency of affording to trades unions the full protection which the statute in question affords to friendly societies. Trades unions have of late found many able defenders, but none more so than an illustrious foreigner, who, in a treatise of singular ability, has placed in the clearest light the entire system and working of the trades unions of this country. (2) It must not, however, be forgotten that while some strikes may be perfectly justifiable to enforce honest and just demands, others may be resorted to in order to extort unreasonable exactions or enforce tyrannical rules, and that the only corrective against such attempts is to be found in the freedom of the labour market, which it is the purpose of these combinations to prevent. It is, however, for the legislature to deal with any proposed alteration of the law. We have only

(1) Law Rep. 2 Q. B. 153.

(2) "The Trades Unions of England" by M. Le Comte de Paris; the original, Paris, 1869; translation by N. J. Senior, London: Smith, Elder, & Co., 1869.

to deal with the case before us according to previous decisions. In the case of *Hornby* v. *Close* (1), we had no alternative,—even had we been disposed to do otherwise,—than to follow the decision in the case of *Hilton* v. *Eckersley* (2), which, being the decision of a court of error, was binding upon us. The present case, when the purposes of the society are gathered from the other evidence in the case, in addition to the rules, appears to me to come strictly within the rule in *Hornby* v. *Close* (1), and I feel therefore bound to hold that the decision of the magistrates in refusing to convict was right, and ought to be affirmed.

I have to add that my Brother Mellor agrees in this judgment.

HANNEN, J. I regret that I am unable to concur in the judgment of my Lord and my Brother Mellor. I am, therefore, obliged to state the reasons which lead me to a different conclusion.

This was a proceeding under s. 24 of 18 & 19 Vict. c. 63, against the secretary of a friendly society, called the Amalgamated Society of Carpenters and Joiners, for wilfully misappropriating 40*l.* belonging to the society. The justices have found that the guilt of the defendant was fully proved; but they dismissed the complaint, on the ground that the society was not entitled to the remedy provided by the Act, because they were of opinion that the rules of the society shewed an illegal purpose. By s. 44 of the statute it is enacted, that in the case of any friendly society established for any of the purposes mentioned in s. 9, or for any purpose which is not illegal, s. 24, which enacts a punishment in case of fraud or imposition by an officer, shall be applicable.

There is no doubt that the society in question was established for some of the purposes mentioned in s. 9; for example, first, for insuring a sum of money to be paid for the funeral expenses of a member or his wife; secondly, for the relief or maintenance of a member in sickness. The only question, therefore, is, whether the society was also established for some other and illegal purpose. The preface to the printed rules of the society sets forth in forcible language, the sincerity of which there is nothing in the rules themselves to impeach, the purposes for which the society was

(1) Law Rep. 2 Q. B. 153. (2) 6 E. & B. 66; 25 L. J. (Q.B.) 199.

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formed; and all of them, so far from being illegal, appeared to be of the most praiseworthy character.

The preamble to the rules is as follows:—"First. This society shall be called The Amalgamated Society of Carpenters and Joiners. Second. The object of this society is to raise funds for the mutual support of its members in case of sickness, accident, superannuation; for the burial of members and their wives; emigration; loss of tools by fire, water, or theft; and for assistance to members out of work; also for granting assistance in cases of extreme distress not otherwise provided for by the rules, for which purpose contingent and benevolent funds shall be formed. Third. It shall be divided into branches, each branch to appoint its own officers and conduct its own business, as described in the following rules." The rules which follow fill fifty-nine closely-printed pages of small type. It is sufficient to say of them, that there is not one which, upon the face of it, is not necessary or conducive to legitimate objects of a friendly society. (1)

But it is said that the rules, though apparently directed to the attainment of proper ends, are capable of being applied to illegal purposes, and that the evidence shews that they were so applied. Undoubtedly, if the printed rules are not the real rules of the association, and if the society, under the pretence of being a benevolent institution, is really a scheme, in whole or in part, designed for the encouragement and support of illegal strikes, the society must be deemed to be established for an illegal purpose; but I can see no ground for supposing that the rules were not honestly framed for the purpose of carrying out the excellent objects specified in the preamble; and although they are, like the laws of every institution, however good, capable of being perverted to evil ends, I can find in the evidence nothing to prove that the members of the society have, as a body, sanctioned the abuse of the rules for illegal purposes; but, further, I am of opinion that the acts relied on by the justices as illegal are not so.

The justices have found that the society was formed for an illegal purpose, on the ground that the rules were, as shewn by the evidence, in restraint of trade; and they have pointed out certain rules which they consider open to this objection.

(1) A copy of the rules, &c., was attached to the case.

It is necessary to examine these in detail. The first is rule 18, s. 6: "Any officer being discharged from employment for holding office, if he sign the vacant book each day, he shall be paid at the rate of the wages he was receiving when discharged, such remuneration to continue until he receive employment." There are some eight or nine different officers, and the members are liable to fines if, when elected, they refuse to accept office. The duties of some of the officers are onerous, and must occasionally occupy much of their time, particularly the secretaries and the six stewards, who are required to visit the sick twice in each week. It may well be, therefore, that an officer may be dismissed from his employment by reason of the fulfilment of the duties of the society interfering with the due discharge of his duty to his employer; or it may be known from experience that some masters disapprove of all combinations amongst the men, and, treating them all as hostile to their interest, refuse to employ an officer of any of them. In either of these cases it is only just that the society should indemnify its officers against loss sustained in its service. There is nothing in the evidence in any way relating to the operation of this rule.

The next regulations to which attention is directed are sections 7 and 9 of rule 18: "Any free or non-free member or members, leaving his or their employment under circumstances satisfactory to the branch or the executive council, shall be entitled to the sum of 15*s.* per week." These regulations are absolutely necessary for the proper administration of the society's funds; without them a member might claim relief when out of work from idleness or sickness induced by intemperance, or other misconduct. But it appears from the evidence of Farrer, a member of the society, though an employer, that the branches make donations to members who are out on strike, "if it should be a case satisfactory to the branch." It was, however, stated by all the witnesses that no coercion is used, and that the society would take no steps against men going back to work. The witness Farrer added: "Nothing has been done under these rules, in my opinion, in restraint of trade, or I would not remain a member of it."

Now, unless we are to hold that every strike is of necessity illegal, there is nothing in this evidence to shew that the funds

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of the society have ever been applied to the support of illegal strikes.

I am, however, of opinion that strikes are not necessarily illegal. A strike is properly defined as "a simultaneous cessation of work on the part of the workmen," and its legality or illegality must depend on the means by which it is enforced, and on its objects. It may be criminal, as if it be part of a combination for the purpose of injuring or molesting either masters or men; or it may be simply illegal, as if it be the result of an agreement depriving those engaged in it of their liberty of action, similar to that by which the employers bound themselves in the case of *Hilton* v. *Eckersley* (1); or it may be perfectly innocent, as if it be the result of the voluntary combination of the men for the purpose only of benefiting themselves by raising their wages, or for the purpose of compelling the fulfilment of an engagement entered into between employers and employed, or any other lawful purpose.

On this point I would refer to the recent Memorandum of Sir W. Erle on the law relating to trades unions, a work which it would be unbecoming in me to praise, but which appears to me to contain a complete exposition of the principle of law applicable to this subject (2). That learned writer says, at p. 23: "As to combination, each person has a right to choose whether he will labour or not, and also to choose the terms on which he will consent to labour, if labour be his choice. The power of choice in respect of labour and terms, which one person may exercise and declare singly, many after consultation may exercise jointly, and they may make a simultaneous declaration of their choice, and may lawfully act thereon for the immediate purpose of obtaining the required terms; but they cannot create any mutual obligation having the legal effect of binding each other not to work or not to employ unless upon terms allowed by the combination." The foregoing passage clearly defines the dividing line between what is legal and what is illegal; and the evidence in this case shews only that the society permits its members to draw upon the funds to which they have contributed, in the event of their being out of

(1) 6 E. & B. 47, 66; 24 L. J. (Q.B.) 353; 25 L. J. (Q.B.) 199.

(2) "The Law relating to Trade Unions, by Sir William Erle, formerly Chief Justice of the Common Pleas." London: Macmillan & Co., 1869.

(1) 4 Jur. N. S. 1074; 2 Jur. N. S. 587

work, for some purpose, not shewn to be illegal, and which the society considers meritorious; while there is a total absence from the rules and practice of the society of anything tending to impose any obligation or coercion on its members.

Another passage in the evidence, which may be relied on in support of the decision of the justices, is that in which it is stated that in the event of there being a strike of which the branch approve, at a particular place, a member will be paid 2*l.* or 3*l.* to take him somewhere else. This appears to me to be legal, on the same ground that the payment of the weekly allowance to members out of work, by reason of a strike, is legal, always assuming that the strike itself is not illegal. The object of sending a member to a distant place is that he may get work there, rather than that he should go to the place where the strike is in operation, and that the funds of the society may be so relieved of the burden of supporting a member while out of work. The tendency of this undoubtedly is to support and maintain the strike for a longer time, and so to increase the chance of the men obtaining the object of the strike. This, it is alleged is in restraint of trade: that is, it disturbs the course and postpones the effect of competition amongst the men, which, if left to itself, might sooner compel them to return to work; and this it is contended is contrary to public policy. I think that our judgment ought not to be based on this line of argument. By the expression that a thing is contrary "to public policy" I understand that it is meant that it is opposed to the welfare of the community at large. I can see that the maintenance of strikes may be against the interest of employers, because they may be thereby forced to yield, at their own expense, a larger share of profit or other advantage to the employed; but I have no means of judicially determining that this is contrary to the interest of the whole community; and I think that in deciding that it is, and therefore, that any act done in its furtherance is illegal, we should be basing our judgment, not on recognized legal principles, but on the opinion of one of the contending schools of political economists.

The cases which were referred to in argument do not appear to me to apply to the present case. In *Hilton* v. *Eckersly* (1) it was

(1) 6 E. & B. 47; 24 L. J. (Q.B.) 353; in error, 6 E. & B. 66, 25 L. J. (Q.B.) 199.

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held that employers could not legally bind themselves to carry on business as a majority of their body should direct. In *Hornby* v. *Close* (1), on the other hand, it was held that the men could not legally bind themselves not to seek work at a shop where disputes connected with the trade had arisen, or not to encourage or to instruct a labourer contrary to the rules of the society, or not to use their influence to procure employment for a non-member; and that a society whose rules were designed to enforce such engagements was established for an illegal purpose.

In this case no obligations in restraint of trade are imposed by the rules; and for the reasons I have given I think that there is no evidence that the rules are applied in restraint of trade. I am, therefore, of opinion that this society is not shewn to be established for an illegal purpose, and that the decision of the justices was erroneous.

HAYES, J. I am of opinion that the decision of the justices in dismissing the charge against the respondent was erroneous.

The question in the case is whether "The Amalgamated Society of Carpenters and Joiners" at Bradford in Yorkshire is entitled under s. 44 of the Friendly Societies Act, 18 & 19 Vict. c. 63, to proceed summarily under section 24 of the Act against the respondent, who was the late secretary, for fraudulently appropriating 40*l.* of their money. And this question depends on the point whether it is or is not a society established for an illegal purpose.

The justices were thoroughly satisfied of the respondent's guilt, but they determined on dismissing the charge and giving him entire impunity as far as they were concerned, because they considered that some of the rules of the society were in restraint of trade, and consequently that the society must be considered as established for an illegal purpose. The particular illegal purpose imputed is, as I understand, that the rules in question, as explained and interpreted by the evidence before the magistrates as to the practice of the society, shew that it is an object of the society to encourage and maintain strikes, so as to operate in restraint of trade.

(1) Law Rep. 2 Q. B. 153.

This decision, therefore, does not depend upon any illegality apparent on the face of the rules themselves, and the case, therefore, is in this respect quite distinguishable from the recent case of *Hornby* v. *Close* (1), where several of the rules set out in the report of the case were highly objectional and restrictive. The rules now before us contain no attempt to interfere with the freedom of the members as to the contracts they may think proper to make with their employers, or to restrain in any manner the free exercise of their own will and discretion in regard to their calling and industry.

The general objects of this society appear from the rules to be the ordinary objects of a friendly society, or purposes of a like nature. The rules provide for payment in cases of sickness, accident, death, and burial, loss of tools, superannuation, and emigration, all of which were recognized as fit purposes of friendly societies in the former general Act, 13 & 14 Vict. c. 115. They also provide for relief to members out of employment, though not occasioned by sickness or accident, but under careful limitations and restrictions. And there is also provision made by a separate fund, called a contingent and benevolent fund, supported by a trifling quarterly payment, for affording discretionary relief in peculiar cases of distress, not falling within the ordinary cases for which the rules provide.

These provisions expound the purposes and objects of the association; and one feels startled at the idea of pronouncing a society with such objects, all of which appear to be substantially good and legal, to be a society established for illegal purposes and unworthy of having its funds protected from depredation, upon the ground of an apprehended restraint of trade. I am ready to admit that it is a bad thing to restrain trade, but I think it a worse thing not to restrain thieving; and a very clear case of illegality ought in my judgment to be made out to support the conclusion at which the justices have arrived.

The rules which are selected and set out in the case as open to objection are ss. 6, 7 and 9 of rule 18, relating to the allowance to members out of work, s. 2 of rule 25 relating to the contingent and benevolent fund, and s. 1 of rule 31 relating to what is called

(1) Law Rep. 2 Q. B. 153.

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equalization of funds. And the question raised is whether these rules, read in connection with the evidence, which is said to explain or interpret them, shew that the society was established for an illegal purpose. In considering this question I shall first examine the rules themselves, and afterwards the evidence which is said to shew their illegality.

As to rule 18, the earlier sections of it, which provide generally for relief to members out of employment, are not objected to, but only the latter sections which relate to such relief under circumstances in which the interests of the workmen appear to come into conflict in a certain degree with those of the employers.

Section 6 seems to me to stand quite independently of the evidence, and is very clearly expressed. It simply provides that any officer of the society, being discharged from employment for holding office, shall be paid the rate of wages he was receiving when discharged, until he again receive employment. I cannot imagine that any serious objection is made to this rule, yet I do not know why otherwise it is set out. It in no way restrains an employer from discharging his workmen, but, as an act of common fairness, provides some indemnity for those who may sustain special injury for performing services to the society.

The 7th and 9th sections respectively, relate to the cases of members either leaving their employment or refusing to accept employment, in both of which cases they are to have an allowance, if they can shew causes satisfactory to the society, but otherwise, not.

The other rules objected to seem scarcely deserving of mention. With regard to rule 25, s. 2, as to the application of the contingent or benevolent fund, a passage is extracted which shews that, in some cases of application being made to the society by other trades as to a case of distress, relief may be given, if the case be ascertained to be genuine and the state of funds warrant it. And rule 31, s. 1, declares that there is to be what is called an equalization of funds, apparently between different branches of the society, once a year. As these two latter objections are scarcely referred to in the evidence, I may dismiss them by observing, that I cannot believe that an occasional discretionary act of relieving a genuine case of distress, even though such distress may have resulted from

a strike, could furnish legitimate proof of illegality of purpose: and that I cannot understand, either from the rule or the evidence as to equalization of funds, what sort of imputation of illegality it conveys.

With respect to the 7th and 9th sections of rule 18, I can see no objection to the general principle, that a body of working men should make out of their own funds a careful limited provision for temporary relief during periods when they may be thrown out of employment. It would, in fact, be objecting to forethought, prudence, and common sense. But it may be said that these particular rules relate to cases where members can get employment but choose to quit or refuse it; and that no reasonable need can exist for such provisions, and that as a man who can fall back on a fund when unemployed, can hold out much longer on any question of wages with an employer, the rule must necessarily have a tendency to keep men unemployed, and so encourage strikes and operate in restraint of trade, or, at all events, can be readily used for such objects. But, on the other hand, it is plain enough that many good causes may exist for leaving or refusing a particular employment, and one of the most frequent and legitimate causes may be a disagreement as to the amount of wages. It is true that men can hold out longer on such a question who have a society's fund to fall back upon; but this applies equally to the case of any individual workman, who by industry and frugality has laid by a sum of money on his own account; but it would be a strange inference to draw from this that industry and frugality operated against public policy and in restraint of trade.

No doubt the trade of an employer is restrained when workmen decline to take the wages which he is willing to give; but it must be remembered that the men are traders as well as the employers, and it would be an odd way of promoting freedom of trade to hold it an illegal purpose on their part to endeavour, out of their own savings, to put themselves in a better position to get what they think a fair price for their labour. If it be objected, that the condition of satisfying the society as to the grounds of leaving or refusing work may enable the society to organize a strike, it may be answered that relief under such circumstances would be open to abuse, and that it would be difficult to devise a better check on

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abuse than the satisfaction of the body out of whose funds the relief is to come, and that such a condition would be, at the least, as likely to prevent strikes as to cause them.

These rules, therefore, appear to me to be unobjectionable in themselves, and I am unable to understand how they can be made "to shew an illegal purpose," by evidence of what may have occasionally been done by the officers of the society in respect of strikes, or any other questionable matter.

The question whether a society has been established for illegal purposes or not, ought, as I think, with rare exceptions, to be decided by the rules themselves, which declare the objects of the society and speak the voice of all its members. To explain and interpret these rules by vague general evidence of what may be sometimes done, is, I think, objectionable, on principle, as explaining written documents by loose parol evidence, as to the construction put on them by different officers; and as such construction might vary from time to time, the result would be to throw the proper meaning and effect of the rules into the utmost uncertainty and confusion. If the rules are legal in themselves, it is, I conceive, the duty of the officers to carry them out legally. The best of rules may be abused in practice, but if, in such a case, the abuse is the fault of the individuals, it ought not to be viewed as affecting the rules themselves or the general purposes of the society to which they belong. I admit that cases may arise where a society may intentionally be established for illegal purposes, but may studiously keep such purposes from sight while they carry them out in practice. In such cases, parol evidence of the acts and practice of the society might be very important on the question arising under the 44th section of the Friendly Societies Act, whether the society in question was or was not, in fact, established for an illegal purpose. Such evidence would not, however, be given to explain or interpret the rules, but to shew that they were a fraud and a sham; such a case ought to be made out by very clear proof, but no such case appears to be suggested or indicated in the evidence set out in this case.

The whole of the evidence relied on is obtained by cross-examination by the respondent's attorney of the witnesses for the prosecution, and chiefly of the nominal prosecutor. The rules now in

question appeared to have been revised in April, 1866 (1), and would probably be deposited shortly afterwards; they could, therefore, have been in operation only about eight months before the committing of the respondent's offence, which was in December, 1866, or January, 1867. But as no date is referred to in the evidence, it becomes, in my mind, very doubtful whether much of what is stated may not refer to matters occurring before the revised rules came into operation.

The first witness, Brown, the treasurer, who had been four years a member, says nothing in his evidence which tends to operate in any way against the society, but much in its favour, when he states, on cross-examination, that there had not been a strike in the district in his time, which negatives very strongly the objection made in the case, that the society is an organization tending to encourage or maintain strikes. He denies having sent money to men who had left work for too low wages, but admits having sent money to other societies or branches, but under what circumstances he does not state, and is not asked on re-examination. He states that they impose no restriction on hours of labour or prices of labour. The other and more material witness is the prosecutor, who was the president, but had been a member only since July 1865. He also states, on his cross-examination, that the society have not even discussed prices or hours of labour at any of their meetings, that he fixed his own price on his own labour, and that there have been no societies' price. This, as well as the evidence of the former witness, is conclusive to shew that the silence of the rules as to all restrictions on labour is an honest one, and fully borne out in practice. He also says, at the conclusion of his evidence, that he is now, and has been for five months, an employer of labour, and that nothing has been done under the rules of the society, in his opinion, in restraint of trade, or he would not be a member of it.

The points relied upon in his cross-examination are the parts where he refers to the case of the society interfering between masters and men who have rules agreed on between them, but which are not observed in practice. In that case he says that under certain circumstances, not very intelligibly stated, but which imply that the masters are to blame, "the men might be drawn

(1) This appeared from the title-page to the rules attached to the case.

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away from that shop, and paid by the society." Now, there is no rule whatever having any reference to this practice. The witness refers to no particular time, nor does he even profess to state what has been done; he mentions no date, and merely says what *might* be done. It strikes me here that the witness may refer to a practice under some former unrevised rules, for I observe that amongst the restrictive rules in *Hornby* v. *Close* (1) there were some that warranted the interference of the society in cases of this nature. At all events, I cannot conceive that such vague and indistinct evidence as this would be of any moment on a question whether this society was established for an illegal purpose.

The remainder of the witness' evidence, on cross-examination, is entirely confined to strikes, which is the point of alleged illegality made in the case. The evidence on this point also is all of the same vague and indistinct nature as that above noticed; neither facts, nor times, nor any particulars are stated, nothing of what has been done in practice, but mere general statements as to what could, or would, or might be done under certain supposed circumstances. Thus he says what the society would do in case of a strike at Devonport, if the branch committee, with the sanction of the executive committee, approved of it, and similar statements. The only passage deserving attention seems to be where he says that members of the society would not be allowed to go to places where there were strikes if we (meaning apparently the officers of the society) could prevent them, and that they would give them money to prevent them, and send them to look for work to distant places, and keep them there. This would be an objectionable practice if carried out habitually, but nothing can be more inconclusive than the evidence on the point. Is it, in point of fact, done habitually? Or was it done at all? And, if so, when was it done, and to what extent? And was it under the present or any former rules? Upon all these points the evidence is wholly unsatisfactory. There is no rule to sanction such a practice, no penalty to prevent members, when they are out of work, from going where they think proper, or to disentitle them to the allowance they might be otherwise entitled to.

The substance of the evidence is that the witness considers that

(1) Law Rep. 2 Q. B. at p. 155; Rules 28 and 29.

the men would be advised not to seek work at places where strikes are on, and would be enabled to travel to other places, though upon the rules there could be no right in the member to claim or the officer to advance such money. Would this be wrong and against what is called public policy? Without professing to know much of what is public policy on this subject at the present time, it appears to me that it would in general be very good policy to advise a man to look for employment at some other place than where a strike existed: for in general the real cause of a strike arises from a depressed state of trade in the place, which makes it necessary for the master to offer lower wages than the men are willing to accept; and it stands to sense that such a place would afford the worst prospect to a man out of work of getting that reasonable amount of wages which every man would be desirous of getting.

In my opinion, the utmost result of this evidence would be to shew that the officers of the society, on some occasions, pursued, in regard to strikes, a course of conduct that was fairly questionable; but I consider that this and all the other evidence totally fail to establish either that the rules shew an illegal purpose, or that the society was established for any such purpose, and, consequently, I think that the society is entitled to the full benefits intended to be conferred by s. 44. The summary remedies intended to be conferred are of vital importance to such societies as the present, and the Act being of a remedial and beneficial nature ought to receive a liberal construction. It is also a well established principle that illegality ought always to be distinctly proved and not left to speculation and presumption; and I may further observe that unreasonable provisions in restraint of trade are, in general, to use the words of Patteson, J. in delivering the judgment of the Exchequer Chamber in *Price* v. *Green* (1) "only void, not illegal." On this ground also I think that the principle acted on in *Hornby* v. *Close* (2) ought not to be extended to a case in which the Friendly Societies Act does not plainly require it, and which in my judgment is not the case here.

I think that it would be a very harsh and unwarrantable construction of the Act, to hold that the society was established for illegal purposes, under the circumstances stated in the case; and

(1) 16 M. & W. at p. 353. (2) Law Rep. 2 Q. B. 153.

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therefore, I think that the determination of the magistrates should be reversed.

The Court being equally divided,

Appeal dismissed. (1)

Attorneys for appellant: *Shaen & Roscoe.*

June 4.

EVANS *v.* BIGNOLD.

*Insurance—Policy on Life—Omission of name of Person Interested—*14 *Geo.* 3, *c.* 48, *s.* 2.

The plaintiff's wife being entitled under a will to 200*l.* on attaining her majority, the trustees of the will agreed to advance the 200*l.* to the plaintiff on his obtaining a surety for the repayment in the event of the wife dying under twenty-one. A person became surety on condition that an insurance was effected on the life of the wife. The 200*l.* was advanced, and an insurance effected by the plaintiff in the name of the wife on her own life:—

Held, that, as the plaintiff was primarily interested in the policy, it was illegal and void by force of 14 Geo. 3, c. 48, s. 2, which renders it unlawful to make a policy without inserting the names of the persons interested therein.

DECLARATION, by William Evans as administrator of Mary Ann Evans, on a policy of insurance for 200*l.* effected with the Norwich Union Life Insurance Society (of which the defendant was the public officer) by Mary Ann Evans on her own life.

Plea, that the policy was, in truth and in fact, made by the plaintiff in the name and on the pretended behalf of Mary Ann Evans, but for the use, benefit, and on the account and behalf of the plaintiff, and not for the use, benefit, or on account of Mary

(1) By 32 & 33 Vict. c. 61: "An Act to protect the funds of Trades Unions from embezzlement and misappropriation," s. 1: "An association of persons having rules, agreements, or practices among themselves as to the terms on which they or any of them will or will not consent to employ or to be employed, shall not, by reason only that any of such rules, agreements, or practices may operate in restraint of trade, or that such association is partly for objects other than the objects mentioned in the Friendly Societies Acts, be deemed for the purposes of s. 24 of the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), for the punishment of frauds and impositions, to be a society established for a purpose which is illegal, or not to be a friendly society within the meaning of s. 44 of the said Act."

By s. 2 the Act is not to continue in force after the 31st of August, 1870.

Ann Evans, and that the name of the plaintiff was not inserted in the policy or the name of the person interested therein, or for whose use, benefit, or on whose account such policy was made; and the policy was and is an unlawful policy under and pursuant to the provisions of 14 Geo. 3, c. 48. (1)

Issue having been joined on this plea, a case was stated by consent.

Mary Ann Evans was married to the plaintiff during her minority; she was entitled under the will of her father to 227*l.* and upwards, upon her attaining the age of twenty-one years.

During her minority the plaintiff was in want of 200*l.*, and applied to the trustees of the will to advance that sum to him in part payment of his wife's legacy, which the trustees agreed to do upon having the repayment of the money secured by a Mr. Jacobs, in the event of Mrs. Evans dying before attaining her majority. Mr. Jacobs having consented to become security for the repayment of the money on condition of an insurance being effected on the life of Mrs. Evans, the 200*l.* was advanced by the trustees to the plaintiff, and a policy of insurance for 200*l.* was, on the 2nd of November, 1863, at the request of Mr. Jacobs, effected by the plaintiff with the defendant's office in the name of his wife.

The policy merely recited that "Mary Ann Evans, No. 44, South William Street, Cardiff, wife of William Evans, hath agreed to effect an insurance upon her own life with the Norwich Union Life Insurance Society for the sum of 200*l.*," &c.

Mary Ann Evans attained her age of twenty-one years on the 28th of November, 1864, and died on the 15th of March, 1865, the premiums having been duly paid; but the society refused to pay the sum insured upon the grounds stated in the plea.

The Court were to have the power of drawing inferences of fact as a jury might: the question being whether the plaintiff was entitled to recover in the present action.

Pinder, for the plaintiff. The plaintiff sues as the adminis-

(1) 14 Geo. 3, c. 48, s. 2: "It shall not be lawful to make any policy or policies on the life or lives of any person or persons, or other event or events, without inserting in such policy or policies the person or persons' name or names interested therein, or for whose use, benefit, or on whose account such policy so made or underwrote."

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trator of his wife. There is no difficulty in a married woman contracting in a matter in which she is interested if the husband allows it, and she can join in the action: *Dalton* v. *Midland Railway Company* (1); and the chose in action will survive to the wife: *Fleet* v. *Perrins* (2); the plaintiff, therefore, rightly sues as administrator of his wife.

[COCKBURN, C.J. The objection to the policy raised by the plea and upon the facts is, that the husband was the person who was interested and who effected the insurance.]

The wife had an insurable interest in her own life: *Wainwright* v. *Bland.* (3)

[COCKBURN, C.J. Conceding that, the insurance was, at any rate, primarily for the benefit of the husband.]

In *Halford* v. *Kymer* (4) Bailey, J., says: "If a father, wishing to give his son property to dispose of, makes an insurance on his son's life in his son's name, not for the father's own benefit, but for the benefit of his son, there is no law to prevent his doing so." In *Shilling* v. *Accidental Death Insurance Company* (5), Martin and Bramwell, BB., were of opinion that a father might insure his own life in his own name for the benefit of his son with the money of the son.

H. T. Cole, Q.C. (with him *Raymond*), for the defendant, cited *Hodson* v. *Observer Life Assurance Society* (6), and was then stopped by the Court.

COCKBURN, C.J. The case is too clear to require further argument. I will take it in favour of the plaintiff, that the object of the policy, looking at the circumstances stated, was bonâ fide for the ultimate benefit of the wife: that is, that the policy was to operate for the present for the protection of the person who had become surety on an advance of money to the husband, but that after it should have satisfied this original purpose, on the wife's attaining her majority and the money being repaid on the receipt by her of the legacy, it should operate for the benefit of the wife herself.

(1) 13 C. B. 474; 22 L. J. (C.P.) 177.

(2) Law Rep. 3 Q. B. 536; in Ex. Ch. ante p. 500.

(3) 1 Moo. & Rob. 481.

(4) 10 B. & C. at p. 729.

(5) 2 H. & N. 42; 26 L. J. (Ex.) 266.

(6) 8 E. & B. 40; 26 L. J. (Q.B.) 303.

But then it seems to me to be perfectly clear, if one person has a present interest in the policy, though after that present purpose is satisfied another person may be the party interested, that according to the words and spirit of the statute, the name of the person having the present interest as well as the person ultimately interested must be inserted. Here, the wife's name is the only name inserted, and, although she is to have the ultimate benefit of the policy after the previous purpose had been satisfied, yet, assuming that, the husband was primarily interested and his name ought therefore to have been inserted. Consequently, the policy was unlawful under the statute and void, and there must be judgment for the defendant.

MELLOR, J. I have come to the same conclusion, though with great reluctance. The objection to the policy is, that it is made by the husband for the immediate benefit of the husband, but in the name of the wife only, for it recites that the wife has agreed to effect an insurance on her own life. Now, whatever might have been the ultimate object of this insurance, the husband was immediately interested in it, and s. 2 requires that the names of all the persons interested should be inserted in the policy, otherwise the policy is unlawful.

LUSH, J. I am of the same opinion. No doubt the law as to life insurance sometimes operates harshly; but no one can say that the law is not based on the soundest principles. Very great crimes may and have been committed, owing to the facilities offered by life insurance. And it was accordingly thought desirable that no person should be at liberty by the contract of insurance to acquire clandestinely an interest in a policy on the life of another. And in order to effect that object it was enacted by s. 2 of 14 Geo. 3, c. 48, that it should not be lawful to make a policy on the life of any person without inserting in it the names of all the persons interested. The only question is whether the names of all the persons interested have been inserted in the present policy. The plea alleges, that the policy was, in fact, made by the plaintiff in the name of his wife for the use of himself. Do the facts prove that? They do, most conclusively. It appears that the wife being a minor, was entitled to between 200*l.* and 300*l.*, under the will of

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her father on attaining twenty-one; the husband being in want of 200*l.* applied to the trustees under the will, and they agreed to advance the 200*l.*, on the condition that a third person would guarantee the repayment in the event of the wife dying under twenty-one, and he made it a condition of his giving the guarantee that an insurance should be effected on the life of the wife. The policy was accordingly effected by the husband to protect himself and the surety, so as to enable them to repay the trustees the advance in the event of the wife dying under twenty-one; but in the policy there is no mention made of anybody but the wife, the husband's name being only mentioned as the husband of the person effecting the insurance on her own life. This policy was therefore unlawful within s. 2. It may be, the husband had in view continuing the policy for the benefit of the wife; but that does not render the policy lawful within s. 2, as it is clear that it was effected primarily for the husband's benefit, and the section requires the names of all persons interested to be inserted.

HAYES, J., concurred.

Judgment for the defendant.

Attorney for plaintiff: *J. A. Sharp.*

Attorney for defendant: *C. Blake, for E. Field, Norwich.*

July 3.

SIMPSON *v.* YEEND.

"*Bribery*"—*Parliamentary Election—Municipal Election*—17 & 18 *Vict. c.* 102, *s.* 2—22 *Vict. c.* 35, *s.* 12.

By 17 & 18 Vict. c. 102, s. 2, and 22 Vict. c. 35, s. 12, every person shall be deemed guilty of "bribery," who shall . . . offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter . . . to induce him to vote . . . at any parliamentary or municipal election.

The defendant, soliciting the vote of a voter, said "he should be remunerated for any loss of time:"—

Held, that this was an offer or promise within the sections.

APPEAL from the county court of Staffordshire, holden at Lichfield.

The facts of the case are given at length in the judgment.

June 4. *Gray, Q.C.* (*R. Henn Collins* with him), for the plaintiff, contended that the promise of the defendant was clearly a

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promise within 17 & 18 Vict. c. 102, s. 2, par. 1 (1), and therefore "bribery;" and relied on *Cooper* v. *Slade* (2), in the House of Lords, as conclusive of the case.

Manisty, Q.C. (*F. H. Bosanquet* with him), for the defendant, contended that what the defendant said was a mere representation; as the offer must be of money, so the promise must be of something tangible; there was no promise which, if accepted, would, putting aside the illegality, have supported an action.

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Mellor, Lush, and Hayes, JJ.,) was delivered by

MELLOR, J. This was a case stated by the judge of the county court of Staffordshire by way of appeal from his own decision, whereby judgment was given for the defendant.

The plaintiff in the county court, Thomas Simpson, sued the defendant, William Yeend, as stated in the particulars of demand, "for 40*s.* forfeited by him by reason of having been guilty of bribery at the election of councillors in the North Ward of the city of Lichfield, held on the 1st day of November, 1867; for that he, the defendant, did on that day directly offer a sum of money to one George Marshall, one of the citizens of the said city, to induce him, as a voter in the said ward, to vote at the said election." (3)

The evidence upon which the plaint was tried is set out by the

(1) See the paragraph in question, in the judgment, post p. 628.

(2) 6 H. L. C. 746; 27 L. J. (Q.B.) 449.

(3) By 22 Vict. c. 35 (The Municipal Corporation Act, 1859), s. 11, "If any person at any election of mayor, councillors, auditors, or assessors for any borough, shall be guilty of bribery, he shall for every such offence forfeit the sum of 40*s.* to any person who shall sue for the same in the county court, with full costs of suit. . ."

Sect. 12: "The word 'bribery' shall include anything committed or done before, at, after, or with respect to the election of any mayor, councillors, auditors, or assessors, which, if committed or done before, at, after, or with respect to any election of any member to serve in parliament, would render the person committing or doing the same liable to any pains, penalties, forfeitures, or conviction for bribery, treating, undue influence, corrupt practices, or other offence, under any Act or Acts for the time being in force with respect to the election of members to serve in parliament for boroughs in England and Wales."

The Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102), s. 2, par. 1, defining "bribery" at parliamentary elections, is given in the judgment, post p. 628.

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judge of the county court, and the question proposed to us is "whether the transaction as described by the defendant is bribery under the statute 17 & 18 Vict. c. 102."

The evidence of the defendant is stated by the judge of the county court as follows: "I saw Marshall's wife, I told her, I called to solicit a vote; she told me, he did not intend to vote, if he did he should offend Mr. Muckleston and Mr. Playfer, she also said, he had been offered something very handsome on the other side, 'and I am sure he will not vote;' she also said he would lose much time by going to vote; I said, he would be remunerated for what loss of time might occur. Never mentioned money, 7*s.* 6*d.* I saw Marshall next morning. I again said, 'I solicit your vote.' He told me, he did not intend to vote. I did not offer him money. I said he would be remunerated for loss of time. I did not offer him a sovereign." (1)

The statute referred to by the judge of the county court, viz., 17 & 18 Vict. c. 102, s. 2, par. 1, makes it bribery in "Every person who shall, directly or indirectly, by himself or any other person on his behalf, give, lend, or agree to give or lend, or shall *offer, promise, or promise to procure, or to endeavour to procure, any money, or valuable consideration, to or for any voter,* or to or for any other person on behalf of any voter, or to or for any other person, *in order to induce any voter to vote, or refrain from voting,* or shall corruptly do any such act as aforesaid, on account of such voter having voted or refrained from voting at any election."

In answer to the question proposed to us by the judge of the county court, we are of opinion that the transaction as described by the defendant is bribery under the statute.

We delayed giving our judgment at the close of the argument, not because of any doubt existing in our minds as to the answer which we ought to return to the question put by the judge of the county court, but because we were assured by the counsel for the defendant, that the election judges had, in their decisions upon the section, taken a view differing from that which we were disposed to take. Had the fact been as suggested, we should not have felt ourselves bound by the opinion of the election judges, unless

(1) The defendant also stated, that by remuneration he meant 3*s.* or 4*s.* or thereabouts, and that he solicited the vote for his party.

upon consideration we had agreed with it; but we thought it desirable to ascertain what opinion had, in fact, been expressed by them with reference to a subject with which their duties had necessarily made them familiar. Upon inquiry we find, as we had anticipated, that those learned judges have expressed no opinion adverse to the conclusion at which we have arrived. Their observations upon this section, so far as it refers to an "offer" or "promise" *not accepted*, merely expressed a rule of prudence and caution as to the quantity and character of the evidence by which such an "offer" or "promise" should be considered as proved.

In the present case, we are relieved from considering *the truth of the evidence*, as it is the statement of the defendant himself which is submitted to us for consideration. We cannot doubt that the words admitted to have been used by the defendant, viz., "that the voter would be remunerated for what loss of time might occur," did, under the circumstances, amount to an "offer," or "promise," "to procure or to endeavour to procure money or valuable consideration to a voter," "in order to induce him to vote," at the election in question. The expression "remuneration for loss of time" would necessarily convey to the apprehension of the voter, that if he would vote for a particular candidate he should receive, either directly from the person offering, or by his procurement, money or valuable consideration which he would not otherwise obtain; and any assurance of that kind, which can *only* be so understood, is calculated to operate upon the mind of the elector as a direct inducement to vote for such candidate.

If any authority were required to induce us to adopt this view of the transaction in the present case, it is supplied by that of *Cooper* v. *Slade* (1), which upon this point is not distinguishable in principle from the present case. It is so important to the public interest that electors should be left free to vote without any disturbing influence of any kind, that we feel ourselves bound in construing the statute in question to give full effect to the plain meaning of the words used, and to apply them to the substantial facts of the case, without raising subtle distinctions or refinements as to the precise words or expression in which the promise or offer may be conveyed.

(1) 6 H. L. C. 746; 27 L. J. (Q.B.) 449.

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The case will be remitted to the judge of the county court, who will set aside the verdict for the defendant and enter it for the plaintiff for 40s., being the penalty provided by the Municipal Act for the offence in question. (1)

Judgment accordingly.

Attorneys for plaintiff: *J. & C. Cole.*

Attorney for defendant: *Wilson, Burton-on-Trent.*

July 3.

POOLE *v.* WILLATS.

Debtor and Creditor—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Composition—Sureties, Reservation of Rights against—Assent by Surety to Deed.*

To an action by an indorsee against acceptor of a bill of exchange, the defendant pleaded a deed of composition, under the Bankruptcy Act, 1861, which contained no reservation of rights against sureties. The plaintiff replied that the bill was accepted for value and indorsed to him for value, and that if he had assented to the deed he would have discharged the drawer. The ~~plaintiff~~ rejoined that before the registration of the deed the drawer consented to the plaintiff executing and becoming bound by the deed. The jury having found this issue for the plaintiff:—

Held, that a deed of composition is not necessarily invalid for not containing a reservation of creditors' rights against sureties, because it cannot be assumed that there are any creditors with sureties; and although the replication shewed that the plaintiff was such a creditor, yet the rejoinder left the deed as it would have been if this fact had not appeared; and that the deed was therefore valid and binding on the plaintiff.

DECLARATION on a bill of exchange for 50*l.*, dated the 8th of September, 1866, drawn on the defendant by Sudgrove & Belton, to their own order three months after date, accepted by the defendant, and indorsed by Sudgrove & Belton to the plaintiff.

Plea, that after the acceptance of the bill, to wit, on the 23rd of November, 1866, the defendant being indebted to plaintiff and other creditors, executed a deed under s. 192 of the Bankruptcy Act, 1861.

The plea set out the deed, which was a deed of composition between the defendant and all his creditors, by which he covenanted to pay, on or before the 22nd of January, 1867, to all his creditors a composition of 5s. in the pound on their respective debts; and the creditors, in consideration of the covenant, absolutely released the defendant. The deed contained a declaration

(1) 22 Vict. c. 35, s. 11, ante, p. 627, n. (3)

that it was intended to operate under s. 192 of the Bankruptcy Act, 1861; but it contained no reservation of the rights of creditors against sureties. The plea then averred that all the conditions necessary to give the deed validity under s. 192 had been performed, and that the plaintiff was, at the time of the execution of the deed, a creditor of the defendant in respect of the bill of exchange; and the defendant tendered to the plaintiff, on the 22nd of January, 1867, the composition, but that the plaintiff refused to receive it; and the defendant paid into court 12*l.* 10s., being the amount of the composition.

Replication, that the bill of exchange was accepted by the defendant for valuable consideration, and was not accepted for the accommodation of Sudgrove & Belton; and it was indorsed to the plaintiff bonâ fide for value; and that the defendant, as between himself and Sudgrove & Belton, was the principal debtor in respect of the bill; and the plaintiff, if he had executed, or in writing assented to, the deed, would have discharged the said drawers of the bill.

Rejoinder, that Sudgrove & Belton, before and at the time of the registration of the deed, consented to the deed and to the plaintiff executing the same, and becoming bound thereby and receiving the composition.

Issue thereon.

At the trial, before Cockburn, C.J., at the sittings in London after Michaelmas Term, 1867, it appeared that the ~~defendant~~ plaintiff had refused to assent to the deed, but that Sudgrove had assented in writing to the deed, on behalf of Sudgrove & Belton, before the registration of the deed.

A verdict was found for the defendant on the issue joined, and leave was reserved to the plaintiff to move.

A rule was accordingly obtained to enter a verdict for the plaintiff for 50*l.* non obstante veredicto, on the ground that a deed, which is otherwise incapable of binding a non-assenting creditor, cannot be made so by circumstances which arose after its execution.

Nov. 23, 1868. *Pearce* shewed cause. The facts disclosed on the record and found by the jury shew that the deed was binding on the plaintiff.

Murphy, in support of the rule. The deed contains no clause

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reserving the rights of creditors against sureties. If the plaintiff had executed or assented to the deed, he would have discharged the drawers of the bill. In *Johnson* v. *Barratt* (1), it was decided that a deed which had no clause reserving rights against sureties was good, unless it was shewn that there were creditors secured by sureties. Here the replication shews that the plaintiff was a creditor who had a right against the drawers as sureties. The question, therefore, is, whether the assent of the sureties to the deed is equivalent to the deed containing a clause reserving the creditors' rights. The deed being bad in its inception, it cannot be made good by matter subsequent; the assent of the sureties, therefore, is of no effect: *Oldis* v. *Armston.* (2)

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Lush, Hannen, and Hayes, JJ.) was delivered by

LUSH, J. This is an action by an indorsee against the acceptor of a bill of exchange, to which the defendant pleaded a composition deed registered under the statute.

The deed, which was set out in the plea, contained no reservation of rights against sureties. The plaintiff replied that the bill was accepted for value, and indorsed to him for value, and that, if he had assented to the deed, he would have discharged the drawers. To this there was a rejoinder, alleging that before the registration of the deed the drawers consented to the plaintiff executing and becoming bound by the deed. Issue was joined upon this allegation, and found in favour of the defendant.

The plaintiff then moved for, and obtained, a rule for judgment non obstante veredicto, which was supported on the ground, that as the deed did not reserve his right against the drawers, the plaintiff was not on equal terms with the other creditors, and that the consent of the sureties to the composition did not remove the inequality.

We think this argument cannot prevail. It has been held that a composition deed is not necessarily invalid for not containing a reservation of rights against sureties, because it cannot be assumed that there are any creditors with sureties: *Johnson* v. *Barratt.* (1)

(1) Law Rep. 1 Ex. 65. (2) Law Rep. 2 Ex. 406.

That is a fact which must be shewn by averment. Here the fact that the plaintiff was such a creditor is shewn by the replication; and, were it not for the rejoinder, that would vitiate the deed: because, if he had executed it without the consent of the drawers of the bill, he would have discharged them, and would thus have been in a worse position than the other creditors, who must be supposed to have had no remedy over for the balance of their debts. But the rejoinder, we think, removes this objection, and leaves the deed as it would have been if this fact had not appeared.

A deed under the statute has no operation against non-assenting creditors until it is registered. If at that date the plaintiff would have been unable to have come in with the rest of the creditors without forfeiting his security, he would not have been bound by the deed, and no subsequent act or assent would have bound him. But as at that period the drawers' consent had been given, and the plaintiff might have come in for the composition, and have held them liable for the balance; he was in precisely the same position as if the right to have recourse to the drawers had been reserved to him in the deed. The case of *Oldis* v. *Armston* (1) is the converse of the present case. There the deed in terms bound the creditors to indemnify the debtor against any bills or notes he might have given them on account of their debts, and was therefore bad on the face of it; and the Court held that it was not made good by an averment that at the time of registration there was no creditor to whom any bills or notes had been given, other than those who had assented to the deed; for creditors were not bound to look beyond the deed, and the deed being bad on the face of it, no averment could make it good. In this case the deed is good on the face of it. We cannot assume that there were any creditors with sureties other than the plaintiff; and as the extrinsic fact which would have vitiated the deed as regards him is met by the rejoinder, and the primâ facie inequality removed, we think he is bound. We therefore discharge the rule.

Rule discharged.

Attorneys for plaintiff: *D. & S. Woolff.*

Attorney for defendant: *J. Croft.*

(1) Law Rep. 2 Ex. 406.

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May 31.

WEST *v.* DOBB.

Landlord and Tenant—Covenant not to assign without Licence.

The plaintiff demised premises in 1860 to T. and P. for fourteen years. The lease contained a covenant by the lessees (not expressed to be on behalf of their assigns), not to assign or part with the possession of the premises without the written consent of the landlord; with a clause of re-entry in case of breach. By a letter of the 25th of March, 1865, the plaintiff assented to a transfer of the lease by the lessees to W. on the same terms as they held it. W., who had purchased the term from them, entered into possession without any formal assignment of the term. W. continued in possession, paying rent, until 1867, when by the written licence of the plaintiff he assigned all his interest in the lease to trustees for his creditors. The trustees sold the lease to the defendant, and he entered into possession. On ejectment for a forfeiture by breach of the covenant not to assign without licence:—

Held, that there had been no forfeiture; that it was unnecessary to decide whether the covenant would have bound assigns though not named, as there never was any assignee of the whole term, so as to be subject to the covenants in the lease. That the parting with possession by the original lessees to W. without a complete transfer was not a forfeiture: as the licence of the 25th of March, 1865, did not in terms forbid such a parting with possession; and that the possession by the cestui que trusts and the subsequent dealing with the property by them could not be considered the acts of the original lessees, and a breach of covenant by them.

EJECTMENT for two farms in the parish of Kenwyn.

The defendant defended for the whole.

At the trial before Blackburn, J., at the Cornwall Spring Assizes, 1868, it appeared that the plaintiff, being owner in fee, granted a lease of the farms in question on the 29th of September, 1860, to Messrs. Tedder and Pridham, for fourteen years from Midsummer, 1860, at a rent of 100*l.* per annum. The lessees executed a counterpart, in which there were joint and several covenants by the lessees for themselves and himself, their and his heirs, executors and administrators (not mentioning assigns), "that they, the lessees, their executors or administrators (inter alia) should not nor would underlet, assign, or otherwise part with the possession of the said demised premises or any part thereof without the written consent of the lessor, his heirs, or assigns, being first had and obtained for that purpose." There was a clause of re-entry in case the lessees, their executors, or administrators, should fail in the observance or performance of any of the covenants on their part.

Tedder and Pridham entered and paid rent; and in 1865, after negotiations between them, one Wade, and the plaintiff, the plaintiff wrote the following letter to Wade:—

"25th March, 1865.

"According to the understanding I had with you and Messrs. Tedder and Pridham, on Thursday last, I beg to say that I consent for you to take the two estates that Messrs. Tedder and Pridham have been renting of me, on the same conditions and in accordance with their lease. This will be sufficient authority for Messrs. Tedder and Pridham to transfer the lease to you on their paying 75*l.*, being for three-quarters year's rent due this day.

"P.S.—It will be necessary for you to write me accepting these terms."

Mr. Wade wrote in answer:—

"Your favour to hand, granting permission to hold your farms on the same terms as Messrs. Tedder and Pridham; I am obliged for the preference, . . . Mr. Tedder has handed me the lease, and I accept it on same terms as they did." . . .

Wade paid Tedder and Pridham for the assignment, but no formal assignment was executed. Wade entered into and continued in possession, paying rent to the plaintiff, until 1867, when he got into difficulties, and negotiations were set on foot to assign all his property to Messrs. Chirgwin and Hamilton, for the benefit of his creditors.

On the 21st of January, 1867, the solicitors acting for Wade and for some of his principal creditors wrote to the plaintiff, saying, "by the lease granted by you to Messrs. Tedder and Pridham, of &c., the lessees cannot underlet without your written consent," and asking the plaintiff, "to be kind enough to give your written consent to the lease being vested in Messrs. Chirgwin and Hamilton, as you did when Mr. Wade took possession."

The plaintiff wrote in answer on the 31st of January, 1867:—

"I have no objection to consent to the trustees, Messrs. Chirgwin and Hamilton, acting for Mr. Wade, in respect of the two small farms, to vest the same in their hands, similar to the transfer I allowed Mr. Wade from Messrs. Tedder and Pridham."

On the 27th of February, 1867, Wade executed an assignment of all his estate and effects, including "all the premises held under

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the lease of the 29th of September, 1860, granted by William West to Tedder and Pridham, and now vested in Wade," to Messrs. Chirgwin and Hamilton, upon trust for the benefit of his creditors.

The trustees paid rent to the plaintiff; and in November, 1867, the trustees signed an agreement with the defendant for the sale to her, inter alia, of the lease of the two farms; and the defendant, thereupon, took possession of the farms.

The learned judge, on these facts, held that no forfeiture was shewn, and nonsuited the plaintiff, giving him leave to move to enter a verdict.

A rule having been obtained accordingly

Jan. 13. *Pinder* shewed cause.

Kingdon, Q.C., and *Charles*, supported the rule.

The arguments sufficiently appear from the judgment: the cases cited are given in a note, post, p. 637.

Cur. adv. vult.

May 31. The judgment of the Court (Cockburn, C.J., Blackburn, and Mellor, JJ.), was delivered by

BLACKBURN, J. This was an action of ejectment tried before Blackburn, J., during the Spring Assizes, 1868, at Bodmin.

It appeared on the trial that the plaintiff had in 1860 demised the premises in question for fourteen years to Tedder and Pridham.

This lease contained various covenants made by the lessees, not expressed to be on behalf of their assigns; and, amongst others, a covenant not to assign or part with the possession of the demised premises without the written assent of the landlord. And there was a clause of re-entry in case of the breach of any of the covenants.

As the term had not expired by efflux of time, the question at the trial was whether it had been forfeited or not.

The facts were not disputed. The plaintiff, by a letter dated the 25th of March, 1865, assented to a transfer of the lease by Tedder and Pridham, to one Wade, on the same terms as those on which they held it. Wade, who had purchased the term from them, entered into possession without having any formal assignment of the term.

Wade continued in possession, paying rent, until 1867, when by

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the written licence of the plaintiff he assigned, inter alia, all his interest in the lease to Chirgwin and Hamilton, as trustees for his creditors.

It appeared that the plaintiff had assented to this transfer under the belief that, by an arrangement between the trustees and Wade, the family of Wade were to be allowed to continue in possession; but the trustees, taking a different view of the matter, sold the term to the defendant, and the defendant entered into possession.

Two grounds of forfeiture were relied on at the trial. First, the unlicensed parting with the possession by Chirgwin and Hamilton, the trustees, to the defendant; and secondly, the parting with the possession by the original lessees, Tedder and Pridham, to Wade, without executing a transfer of the lease, so as to make him an assignee, and as such bound by all such covenants as ran with the land.

A nonsuit was directed, reserving leave to enter a verdict for the plaintiff. Mr. Kingdon obtained a rule nisi accordingly, which was argued in last Hilary Term.

There was much argument at the bar as to whether, upon the true construction of the covenant in the lease, it bound the lessees only not to assign, and was merely a personal restriction not affecting their assigns, or whether it was a covenant running with the land and binding every assign. (1) In the view we take of the matter, it is not necessary to express any opinion on this point, as there never was, in our opinion, any assignee of the whole term so as to be subject to any of the covenants in the lease, and therefore if there was any forfeiture of the term, it could only be in conse-

(1) The defendant's counsel contended, that, assigns not being mentioned, the covenant not to assign, though decided in *Williams* v. *Earle* (Law Rep. 3 Q. B. 739) to run with the land, did not bind assignees: on this he cited *Doe* v. *Payne* (1 Stark. 86); *Seers* v. *Hind* (1 Ves. 295); *Roe* v. *Harrison* (2 T. R. 425); 2 Platt on Leases, 272–273; Woodfall's Landlord and Tenant, 9th ed. 550; 5 Davidson's Conveyancing, 176, n. (c); *Whitchcot* v. *Fox* (Cro. Jac. 398); *Doe* v. *Smith* (5 Taunt. 795); *Paul* v. *Nurse* (8 B. & C. 486). The plaintiff's counsel referred to *Bally* v. *Wells* (3 Wils. 25, 33); and relied on *Spencer's Case* (5 Rep. 16 a.; 1 Sm. L. C. 6th ed. 45); *Tatem* v. *Chaplin* (2 H. Bl. 133); and on *Williams* v. *Earle* (Law Rep. 3 Q. B. 739, 749), as having decided this very point. But Blackburn, J., protested against the judgment in that case being taken to have decided more than that the covenant ran with the land and bound the assignee, *assigns* being mentioned; that fact being expressly pointed out in the judgment of Blackburn, J.

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quence of a breach of covenant by the original lessees, Tedder and Pridham. It was also argued, that the parting with the possession by Chirgwin and Hamilton, the trustees for Wade's creditors, to the defendant was such a breach of covenant on the part of Tedder and Pridham, the original lessees: because it was said that the law takes no notice of the relation of trustee and cestui que trust; and therefore, it was argued, that the possession of Chirgwin and Hamilton, the cestui que trusts, must be considered at law as the possession of Tedder and Pridham, and the change of the cestui que trusts from Chirgwin and Hamilton to the defendant must be considered a parting with the possession by the trustees, Tedder and Pridham, and consequently, a breach of covenant on their part, for which they would be liable in damages, though they neither were parties to the change nor had any power to prevent it. But no authority was cited in support of this very artificial reasoning. And we think it obvious that it involves in itself the fallacy of requiring the Court to hold (contrary to the fact) that Chirgwin and Hamilton (the assigning cestui que trusts) were merely servants to Tedder and Pridham; and yet to take notice that the defendant, to whom they transferred their equitable interest, was more than a servant to Tedder and Pridham.

The second ground of forfeiture depends upon the effect of the written licence of the 25th of March, 1865. We do not doubt that the plaintiff might have granted a licence to assign the term, so expressed as to forbid the lessees parting with the possession until a complete transfer of the legal interest had been executed. But the practice of letting a purchaser into possession before the legal estate is transferred is so common, that if it was intended to forbid such a change of possession, it ought to have been clearly expressed, and in the present case it was not. The utmost effect which can be given to the expressions in the letter is that the landlord had a right to call upon the parties to complete the transfer of the legal estate, which he never did.

The rule, therefore, must be discharged.

Rule discharged.

Attorneys for plaintiff: *Coode, Kingdon, & Cotton, for Shilson, Coode, & Co., St Austell.*

Attorneys for defendant: *Hooke & Co.*

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June 9.

Bill of Exchange—Notice of Dishonour.

The plaintiff, having supplied goods in the way of trade to a company, was about to sue the company, but agreed to take a bill of exchange for the amount accepted by the company, if two of the directors indorsed it. The plaintiff accordingly attended at the office of the company, and a bill was drawn on the company, and accepted on behalf of the company by the manager; and the defendant and another director, both of whom were in the habit of attending at the company's office, put their names to the bill as indorsers. When the bill became due it was not paid, the company being then in progress of being wound up, and the plaintiff, not knowing the defendant's residence, immediately sent a notice of dishonour addressed to the defendant at the office of the company; but the defendant did not receive it till long after, having ceased to attend there on the company becoming embarrassed:—

Held, that, under the circumstances, the notice of dishonour was good.

DECLARATION against the defendant as indorser of a bill of exchange.

Plea: A traverse of the notice of dishonour.

Issue thereon.

At the trial before Blackburn, J., at the sittings in London after Michaelmas Term, 1868, it appeared that the plaintiff had supplied stationery for the purposes of the business, to the Industrial London Loan and Interest Company, Limited, and threatened to sue the company for the amount, 72*l.* 10*s.*; but he agreed to take a bill of exchange for the amount accepted by the company, provided two directors of the company indorsed the bill. Accordingly the plaintiff attended at the office of the company, 20, Great George Street, and a bill of exchange dated the 22nd of April, 1868, was drawn by the plaintiff to his own order, for 72*l.* 10*s.*, payable at three months, upon the "Industrial London Loan and Interest Company, Limited, 20, Great George Street, W.C.," and the bill was then and there accepted on behalf of the company, by C. Beavan, manager, and indorsed by the defendant and J. Johnstone, both of whom were acting directors, and in the habit of attending at the company's office.

Soon after this there was a proposal for amalgamation with the Provident Union Company, Bridge Street, Blackfriars, but the amalgamation was not carried out; and in June a petition was

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filed, and on the 17th of July an order made for winding up the company.

The bill being unpaid at maturity, the plaintiff immediately sent notice of dishonour to the defendant, addressed to the office of the company, 20, Great George Street, but it did not reach him till some time afterwards, as he had ceased to attend at the office of the company upon the company becoming embarrassed.

The defendant lived at Petersham, but the plaintiff knew nothing about him. The plaintiff made inquiries at the office of the Provident Union Company, and also of one of the directors of the other company, who informed him that the defendant lived somewhere on the South Western line of railway; but the plaintiff did not inquire at the office of the defendant's company, 20, Great George Street.

The writ was issued on the 29th of July, and served on the defendant on the 4th of August, 1868, at his house at Petersham.

In answer to a question of the learned judge, the jury found that the plaintiff had done his best to find out the private residence of the defendant; and a verdict was directed for the plaintiff, with leave to the defendant to move to enter a nonsuit.

A rule was obtained accordingly, on the ground that there had been no notice of dishonour, and no circumstances to excuse the want of it.

Warton shewed cause, and contended that the plaintiff did make sufficient inquiry as to the place of residence of the defendant; and if not, the notice of dishonour at the place of business of the company for whose debt the bill was accepted, and on his behalf the defendant, as director, became surety, was sufficient. The defendant gave no other address, and for the purposes of the bill he must be considered to have held out that place as his place of business. He cited *Siggers* v. *Browne* (1); *Hewitt* v. *Thompson* (2); *Beveridge* v. *Burgis* (3); *Rowe* v. *Tipper*. (4)

[HAYES, J., referred to *Bateman* v. *Joseph*. (5)]

Hodgson, for the defendant, was directed by the Court to confine his argument to the second point, and he cited *Re Leeds Banking Company, Ex parte Prange*. (6)

(1) 1 Moo. & Rob. 520.
(2) 1 Moo. & Rob. 543.
(3) 3 Camp. 262.
(4) 13 C. B. 249; 22 L. J. (C.P.) 135.
(5) 12 East, 433.
(6) 35 L. J. (Ch.) 33.

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COCKBURN, C.J. I am of opinion that the rule should be discharged. There can be no doubt that, when the holder of a bill of exchange seeks to sue an indorser, he must give due notice of dishonour, if the bill when due is not met by the acceptor, and he must find out the indorser, or at all events use reasonable diligence to find out either his place of residence or place of business, if the bill has been indorsed in his way of business or trade; and if the bill has been given or indorsed in the way of business it is enough if the holder give notice of dishonour at the indorser's place of business. In the present case the notice was not given at the defendant's place of residence, but only at the office of the company of which the defendant was a director. We have to consider whether the office of the company was the place of business of the defendant, or at all events, looking at the circumstances under which the bill was given, whether the defendant authorized the plaintiff to treat the office of the company as his place of business for the purposes of the bill, or as the place where he would be likely to be found. The bill was given for a debt of the company of which the defendant was an acting director; and when the plaintiff agreed to take the bill he insisted that it should have the names of two directors as an additional security. The bill was accordingly drawn and accepted at the office of the company, and the defendant indorsed the bill at the office as a director of the company; and though he may have thought he had not made himself liable in his individual capacity, yet the bill was given to keep the affairs of the company straight, and the transaction took place at the office of the company as a business transaction of the company. Under the circumstances, therefore, I think the defendant authorized the plaintiff to treat the office of the company as the place, in case the bill was not paid, at which the defendant would be found, or from which the notice of dishonour would be forwarded to him so as to reach him in due time; therefore I think the office of the company was the place of business of the defendant with reference to this particular transaction, which was entirely for the business of the company. Upon the other point it is unnecessary to give any decided opinion, though I am strongly inclined to think the plaintiff did not use reasonable diligence to find out the defendant's place of residence.

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BLACKBURN, J. I am of the same opinion. No doubt when the holder, on the default of the acceptor, means to sue prior parties to the bill, he must give them due notice of dishonour, unless there are any circumstances to excuse it. And he would be excused if he could not find the indorser after due diligence in searching for him, and no place could be found at which to give the notice. In the present case the plaintiff did not know the private residence of the defendant, and he made some attempts to find it out; but I think it at least very doubtful whether they were sufficient to excuse the want of notice, and I should be very unwilling to decide in favour of the plaintiff on this point. On the other point, the holder of a bill has fulfilled his duty if he sends the notice of dishonour to the place which the indorser held out as the place at which he is likely to be found for the purpose of receiving notice; and if the indorser has a place of business it is sufficient to send it there, and the holder need not go to the indorser's place of residence. In the present case, Petersham was the defendant's place of residence, but it was not known to the plaintiff; and the facts were, that the company, of which the defendant was an acting director, being about to be sued for a debt due to the plaintiff, a compromise was effected on condition that two of the directors should put their names to a bill of exchange accepted on behalf of the company. Accordingly, the parties met at the company's office, 20, Great George Street, for the purpose, and the defendant, as one of the two directors, and because he was a director of the company for whose debt the bill was given, put his name on the bill as indorser. The plaintiff knew nothing of the defendant, except that he was a director of the company; and the transaction may be called a domiciling of the bill at the company's office; and the defendant may, as it seems to me, be taken to have held out that he would be found there, so as to entitle the plaintiff to treat the office as the defendant's place of business for the purpose of the bill. It seems to me, therefore, on the best consideration that I can give, that the notice of dishonour was sufficient, inasmuch as the bill is made at and addressed to the company at 20, Great George Street, and the defendant indorses it there. I do not mean by any means to say that a director indorsing a bill of exchange as surety for a company,

thereby as a matter of course makes the place of business of the company his place of business, so as to make a notice of dishonour left there sufficient. But, under the circumstances of the case, I think it may be fairly said that the defendant, as it were, impliedly stated that the place of business of the company was the place where he was to be found.

LUSH, J. I am also of opinion that the notice of dishonour was sufficient. A notice is good if sent to the place of business of the indorser. Here the only business of the defendant was as a director of the company; this was a business bill of the company, and was indorsed by the defendant at the office of the company, and he indorsed it without inserting any other address than that already on the bill.

HAYES, J., concurred.

Rule discharged.

Attorney for plaintiff: *J. S. Miller.*
Attorney for defendant: *C. Harcourt.*

SAMPSON *v.* MACKAY.

June 12.

Costs—30 & 31 *Vict. c.* 142, *s.* 5—*Damages not exceeding* 10*l. in an Action for Slander.*

By 30 & 31 Vict. c. 142, s. 5, if in an action of tort commenced after the passing of the Act in any of the superior courts the plaintiff shall recover a sum not exceeding 10*l.*, he shall not be entitled to any costs, unless the judge certify that there was sufficient reason for bringing the action in the superior court, or the Court or a judge at chambers shall by rule or order allow such costs. In an action for slander commenced in a superior court after the passing of the Act, a verdict was found for the plaintiff for 3*l.*, and the judge refused to certify. On an application to the Court for costs:—

Held, that s. 5 applies to all actions whether they can be brought in the county court or not. The Court, in reviewing the refusal of the judge to give the plaintiff his costs in an action in which less than the statutable limit has been recovered, will take into consideration all the circumstances of the case; and the fact that the action could not be brought in the county court is merely one element in determining the exercise of their discretion.

Gray v. *West* (ante, p. 175), and *Craven* v. *Smith* (Law Rep. 4 Ex. 146) distinguished.

FIRST COUNT, that defendant broke and entered the dwelling house of the plaintiff, and expelled the plaintiff and his family therefrom.

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Second count, that the defendant falsely and maliciously spoke and published of the plaintiff the words following: "He is unable to pay his rent, and if you (meaning a person who rented lodgings of the plaintiff), take my advice, you will leave at once," meaning thereby that the goods of the persons which were in the house would be in danger of being seized by the plaintiff's landlord for rent, if such person did not remove with her goods, by means whereof several persons who rented lodgings of the plaintiff in the house, gave up and left their lodgings, and thereby the lodgings became untenanted, and the plaintiff lost the rent which he would otherwise have made by their being tenanted.

Third count, the defendant falsely and maliciously spoke and published of the plaintiff the words following: "He took the gas-meter away from the house," meaning thereby that the plaintiff has stolen a gas-meter.

Plea: Not guilty. Issue thereon.

At the trial before Mellor, J., at the Middlesex sittings, in Easter Term, 1869, the following facts were proved. The plaintiff, an attorney's clerk, was tenant to the defendant of a house situate at Hoxton. The defendant gave the plaintiff notice to quit on the 24th of June, 1868. On the 22nd of June, the plaintiff quitted the house, taking his goods with him, and leaving the last quarter's rent unpaid; on the 25th of June, the door of the house was found open by the police, and was then fastened by the defendant's servant. On the 26th, the defendant demanded the key of the house of the plaintiff, who refused to give it up. The defendant thereupon took possession of the house. The plaintiff had had lodgers, some of whom quitted the plaintiff's house owing to a threat by the defendant, that if the rent due by the plaintiff should not be paid he would levy a distress. This formed the ground of action alleged in the second count. The defendant denied ever having uttered the slander mentioned in the third count.

There being no plea of not possessed on the record, the learned judge directed a verdict for the plaintiff on the first count, and the jury assessed the damages at one farthing. On the second count, the jury found a verdict for the plaintiff with 3*l.* damages, and on the third count, a verdict for the defendant.

The learned Judge refused to certify under 30 & 31 Vict. c. 142,

s. 5 (1), that there was sufficient reason for bringing the action in the superior court.

An application was made to a judge at chambers, who declined to make an order for costs.

A rule was then obtained calling on the defendant to shew cause why he should not pay to the plaintiff his costs of the action to be taxed by the master.

Cook shewed cause. The judge having refused to certify for costs, the Court will not grant this application unless there are special circumstances which they think ought to entitle the plaintiff to his costs. The present case is distinguishable from both *Gray* v. *West* (2) and *Craven* v. *Smith*. (3) In the first case the plaintiff recovered a verdict for 10*l*., which was substantial damages; and in the other, although the verdict was for 5*l*., the nature and circumstances of the case were such that the undersheriff who tried the cause would have granted a certificate if he had thought he had power to do so. That was an action of slander, imputing a felony in the strongest and most offensive language. In *Craven* v. *Smith* (4) Bramwell, B., says: "The case of *Gray* v. *West* (2) appears at first sight to lay down that in all cases which must be brought in a superior court an order or rule for costs ought to be granted. I do not, however, desire—and I do not think my Brother Hayes, in delivering the judgment of the Court of Queen's Bench, desired—to lay down so wide a rule. For the action might be vexatious, and I should be very sorry to be obliged to regard the verdict of the jury as absolutely conclusive." In the present case, although the jury have given a verdict for the plaintiff on the second count, with 3*l*. damages, the action was vexatious; and if s. 34 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126),

(1) 30 & 31 Vict. c. 142, s. 5:—"If in any action commenced after the passing of this Act in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding twenty pounds if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the Court or a judge at chambers shall by rule or order allow such costs."

(2) Ante, p. 175.

(3) Law Rep. 4 Ex. 146.

(4) Law Rep. 4 Ex. at p. 151.

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had not been repealed, an application might have been made to the judge to deprive the plaintiff of costs. The repeal of that section by s. 33 of 30 & 31 Vict. c. 142, sch. C., prevents any such application from being made. This shews that this case comes within the spirit of s. 5 of 30 & 31 Vict. c. 142, and that this statute applies to all actions, whether they can be brought in the county court or not; and the plaintiff not having obtained a verdict for more than 10*l.*, the Court will not, in their discretion, make an order allowing him costs.

Finlay, in support of the rule. Section 5 of 30 & 31 Vict. c. 142, does not apply to actions which cannot be brought in the county court. The intention of the statute was to extend the jurisdiction of the county courts, and to prevent actions for small amounts being brought in the superior court. The plaintiff having recovered 3*l.* in an action of slander which could not have been brought in the county court, the Court has no option but to allow him his costs. *Gray* v. *West* (1) decides that s. 5 was not intended to have any application to cases in which the county court had no jurisdiction; and in *Craven* v. *Smith* (2) Bramwell, B., says: "As the action could not be brought anywhere else than in a superior court I think we ought to—I had almost said must—grant this rule." Under 3 & 4 Vict. c. 24, s. 2, if the plaintiff recovered less than 40*s.* he would not, but if he recovered that amount he would be entitled to costs. Even, therefore, if it is discretionary with the Court to grant the plaintiff his costs where the verdict exceeds 40*s.*, they ought to exercise their discretion in favour of the plaintiff.

COCKBURN, C.J. I think this rule should be discharged. The case divides itself into two questions, to which different considerations apply. Mr. Finlay contends, in the first place, that s. 5 of 30 & 31 Vict. c. 142, does not apply to an action like the present; and, in the second place, that if it does, the Court should, in the exercise of their discretion, give the plaintiff his costs. As to the first point, s. 5 is general in its terms, and applies not only to those actions which can be brought in the county courts, but to all actions of tort, including slander. It has, however, been argued that this section being found in an Act which only deals with

(1) Ante, p. 175. (2) Law Rep. 4 Ex. 146, 150.

the jurisdiction of the county courts, and the intention of the legislature being to force people to bring actions of a particular class in the county courts, the section cannot be held to apply to actions which cannot be brought in those courts. This argument may, at first sight, seem plausible, but our attention has been called to the fact that, prior to the passing of this Act, s. 34 of the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), was in existence, which enabled a judge, by certifying that an action ought not to have been brought, to deprive a plaintiff of his costs. The experience of every judge coincides with that of my Brother Mellor, that a vast number of actions of slander are frivolous, and ought to be discouraged. Therefore when we find the legislature dealing with this subject in this County Court Act, and repealing s. 34 of the Common Law Procedure Act, this goes far to shew that the terms of s. 5 being general, its application is also general. I think, therefore, we must read s. 5 as general in its terms and in its application.

That being so, then comes the second question, whether in the exercise of our discretion this is a case in which the Court will give the plaintiff his costs. [The Chief Justice read s. 5.] Under that section we are called upon to exercise our power to give costs, and the whole question is, whether this is a fit case for costs. That depends on the nature of the action and the circumstances under which it is brought. My Brother Mellor has stated his view that the action is not one in which the plaintiff ought to have costs. We entirely concur with him. The plaintiff only recovered 3*l.* as damages on the second count for slander, and the action was of a trumpery character. The rule, therefore, will be discharged.

BLACKBURN, J. I am entirely of the same opinion. I agree with Mr. Cook's argument, founded on s. 34 of the Common Law Procedure Act, 1860. Under that section, a plaintiff in any action of tort, who recovered less than 5*l.*, might be deprived of his costs if the judge thought fit to certify, and this is a strong indication that the legislature intended s. 5 of 30 & 31 Vict. c. 142, to apply to all actions, whether they could be brought in the county court or not. However, the cases of *Gray* v. *West* (1), and

(1) Ante, p. 175.

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Craven v. *Smith* (1), decide that in exercising their discretion the Court may take as one element for consideration the fact that an action of slander cannot be brought in the county court. Another element is the opinion which the judge presiding at the trial has formed as to the merits of the case. The Court must take into consideration all the circumstances of each case, and I think that this is not a case for granting costs.

MELLOR, J. I am also of the same opinion. The action was really brought for the trespass, and the counts in slander were an afterthought. The plaintiff was an attorney's clerk, who thought it better to have three strings to his bow. I was surprised at the verdict on the second count, and was dissatisfied with it. There was good reason for giving to the Court or a judge at chambers, as well as to the judge presiding at the trial, power to certify for costs, because facts not appearing at the trial may subsequently be stated on affidavit. It certainly was not intended to encourage the bringing of actions of slander, and therefore I agree that this rule ought to be discharged.

HANNEN, J. I am of the same opinion. I desire to add a few words as to the application of *Gray* v. *West* (2), to the present case. It appears to me, for the reasons already given, that s. 5 of 30 & 31 Vict. c. 142, is general in its application, and includes actions of slander. It gives to the Court, or judge at chambers, larger powers than to the judge at the trial. The judge at the trial might very properly refuse to certify that there was sufficient reason for bringing the action in the superior court, but facts may be brought to the knowledge of a judge at chambers, which would induce him to allow the costs. Another case where the section applies is, where the Court thinks that the judge at the trial has not exercised his discretion properly. All that *Gray* v. *West* (2) decides is, that there were reasons which ought to have influenced the judge to give the plaintiff his costs. The ground of the judgment of the Court is contained in the last sentence (3): "We think, therefore, that as in the present case the plaintiff has recovered an amount much beyond what would have entitled her to

(1) Law Rep. 4 Ex. 146. (2) Ante, p. 175. (3) Ante, p. 179.

costs under the general law applicable to actions for slander in the superior court, and as she could not have sued elsewhere, we think that she ought to be allowed her costs in this action." That was a case in which the jury had given the plaintiff damages almost to the limit which would have entitled her to costs; if they had given one penny more she would have had her costs. Taking into account the large amount of damages given by the jury, and the fact that the action could not have been brought in the inferior court, the Court thought that the plaintiff ought to be allowed her costs. Our decision in the present case does not in any way conflict with *Gray* v. *West.* (1)

Rule discharged.

Attorney for plaintiff: *Carter.*

Attorney for defendant: *Long.*

MYERS *v.* VEITCH. *June* 15.

Bankrupt—Protection—Arrest—"Officer"—12 & 13 Vict. c. 106, s. 113.

By 12 & 13 Vict. c. 106, s. 113, if any bankrupt shall be arrested for debt after his surrender and while protected by order of the Court, he shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such protection to him, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l.* for every day he shall detain such bankrupt:—

Held, that the words "if any officer shall detain" refer to the "officer who shall arrest" the bankrupt; and a gaoler who detains a bankrupt, delivered into his custody, notwithstanding his protection, is not liable to the penalty.

DECLARATION that, after the passing of the Bankrupt Law Consolidation Act, 1849 (12 & 13 Vict. c. 106), the plaintiff was adjudicated a bankrupt under the provisions of that statute, and the other statutes in force, concerning bankrupts, and had duly surrendered, and at the time of the committing of the grievances hereinafter mentioned was protected and free from arrest and imprisonment, by virtue of an order of the court having jurisdiction in that behalf duly made under and pursuant to the statutes

(1) Ante, p. 175.

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in that behalf; and whilst the plaintiff was so protected by the said order, he was arrested for debt within the meaning of s. 113 of 12 & 13 Vict. c. 106; and the defendant, being an officer within the meaning of the said section, detained the plaintiff after the plaintiff had shewn to the defendant such protection for a longer time than was necessary for obtaining a copy thereof and after the plaintiff had given to the defendant a copy of the same, that is to say, for six days thereafter, contrary to the statute, whereby the defendant forfeited, and became liable to pay the plaintiff, the sum of 5*l.* for every day the defendant so detained the plaintiff.

Pleas: 1. Not guilty. 2. That the defendant was not an officer within the meaning of s. 113 of the Bankrupt Law Consolidation Act, 1849. 3. That the plaintiff did not shew to the defendant the protection as alleged.

Issue thereon.

At the trial, before Lush, J., at the Liverpool winter assizes, 1868, the following facts were admitted. The plaintiff was adjudged a bankrupt on his own petition on the 16th of June, 1868, and received a certificate of protection extending to the 23rd of July following. He was arrested on a ca. sa. on the 15th of July, and lodged on the same day in Walton gaol, of which the defendant was the governor. On the plaintiff's arrival at the gaol, the protection was shewn to the defendant, and the plaintiff demanded his release, but the defendant refused to discharge him.

On the 17th of July an office copy of the protection was served on the defendant, who still refused to discharge the plaintiff.

An application for the plaintiff's discharge was afterwards made to the Court of Bankruptcy, and an order was made on the 23rd of July discharging the plaintiff from custody, and he was then liberated.

The learned Judge directed a verdict for the plaintiff for 30*l.*, with leave to the defendant to move to enter a nonsuit.

A rule was accordingly obtained, on the ground that on the admitted facts the plaintiff was not entitled to maintain the action.

C. Russell shewed cause. The question is, whether the governor of a gaol is an "officer" within the meaning of s. 113 of 12 & 13

Vict. c. 106. (1) That section contains two distinct provisions:— first, that a bankrupt protected by a certificate shall not be arrested; secondly, that, if arrested, he shall not be detained: and subjects both the officer who arrests and the gaoler who detains the bankrupt to a penalty. The words "any officer" include not only the officer who arrests, but any officer who detains the bankrupt.

[LUSH, J. That would give the bankrupt two remedies.]

Yes; but the officer who arrests the bankrupt would be liable only for the penalty for one day, because he is bound immediately to take him to gaol: *Lees* v. *Newton*. (2) The officer who arrests cannot detain the bankrupt in custody.

[BLACKBURN, J. The section provides that the officer who arrests, on production of the certificate, shall immediately discharge the bankrupt; but it does not say that on shewing the certificate to the officer who detains the bankrupt, the officer shall discharge him.]

If the bankrupt is detained in custody, he would have to be discharged by an order of the Court of Bankruptcy.

[BLACKBURN, J. The language of 5 Geo. 2, c. 30, s. 5 (3), from

(1) 12 & 13 Vict. c. 106, s. 113: "If any bankrupt shall be arrested for debt, or on any escape warrant, on coming to surrender, or shall, after his surrender and while protected by order of the court, be so arrested, he shall, on producing such protection to the officer who shall arrest him and giving such officer a copy thereof, be immediately discharged; and if any officer shall detain any such bankrupt after he shall have shewn such protection to him, except for so long as shall be necessary for obtaining a copy of the same, such officer shall forfeit to such bankrupt, for his own use, the sum of 5*l.* for every day he shall detain such bankrupt, to be recovered by action of debt in any court of record at Westminster in the name of such bankrupt, with full costs of suit."

(2) Law Rep. 1 C. P. 658.

(3) 5 Geo. 2, c. 30, s. 5. . . And in case such bankrupt shall be arrested for debt, or on any escape warrant, coming to surrender himself to the said commissioners, or after his surrender shall be so arrested within the time before-mentioned, that then, on producing such summons or notice under the hands of the said commissioners, assignee or assignees, to the officer who shall arrest him, and making it appear to such officer that such notice or summons is signed by the said commissioners, or the major part of them, or such assignee or assignees, and giving such officer a copy thereof, shall be immediately discharged. And in case any officer shall detain such bankrupt (after he shall have shewn such notice or summons to him, and made it appear it was signed as aforesaid) in his custody, such officer shall forfeit and pay to such bankrupt, for his own use, the sum of 5*l.* for every day such officer shall detain such bankrupt, to be recovered, &c.

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which s. 113 is taken, is not precisely the same as s. 113; and it is very plain that by s. 5 the officer who *arrests and* detains the bankrupt is the only officer liable to a penalty. The difference in the wording of the two sections is too slight to induce me to think the legislature intended to make any change.]

In *Bancroft* v. *Mitchell* (1) the declaration alleged that the gaoler was an officer within the meaning of s. 113; and it seems to have been conceded both by the Court and the counsel that the declaration was good, and an action would lie against the gaoler.

Crompton, in support of the rule, was not heard.

BLACKBURN, J. I think when we look at the terms of this enactment, and find it imposes a penalty, we ought to see clearly on whom the penalty is imposed. The section provides that the bankrupt who has obtained an order of protection shall, on producing such protection to the officer who shall arrest him, and giving such officer a copy thereof, be immediately discharged. Here, when the bankrupt was arrested, if he had complied with the requirements of s. 113, he would have been entitled to be immediately discharged. Then the section proceeds: "If any officer shall detain such bankrupt after he shall have shewn such protection, such officer shall be liable to a penalty." Now, after the arrest the bankrupt was taken to gaol, and produced his protection to the gaoler; if the gaoler had then discharged him, and an action for an escape had been brought, I think it would have been extremely doubtful whether this section could have been set up as a defence. It is contended that "any officer" are words having a wider signification than the words "the officer who shall arrest," and that they must include a gaoler who detains the bankrupt, and that the gaoler is liable to the penalty. But to support this contention it must be argued that the legislature intended that the gaoler should discharge the bankrupt on the production of the certificate. To hold this would be to put a wrong construction on the section. The section must be confined to the officer who arrests. When the bankrupt is once lodged in gaol, the section does not apply. Sect. 5 of 5 Geo. 2, c. 30 (2), more clearly shews the meaning of the enactment; and as a penalty is not to be im-

(1) Law Rep. 2 Q. B. 549. (2) Ante, p. 651.

posed without clear words, I think the rule to enter a nonsuit must be made absolute.

LUSH, J. I am of the same opinion. I think we are not justified in extending, by implication, a penal clause to a second class of officers. I think the intention was to confine the section to officers who arrest, and that the words "any officer" in the second clause refer to the officer mentioned in the first part of the section.

HAYES, J. I think the section was not intended to apply to a gaoler, who has no power to discharge the bankrupt until he receives an authority in a regular manner.

Rule absolute.

Attorneys for plaintiff: *Underhill & Field.*
Attorneys for defendant: *Wright & Venn.*

HARRIS AND ADAMS *v.* QUINE.

June 7.

Statute of Limitations (21 *Jac.* 1, *c.* 16)—*Lex fori*—*Plea of Statute of Limitations and Judgment thereon in country of contract no bar to action in England*—*Attorney's Bill, Action on.*

The plaintiffs, attorneys in the Isle of Man, were retained by the defendant, in 1858, to conduct a suit in one of the Manx courts in which he was defendant. The suit was dismissed in April, 1861; in September, 1861, the plaintiff in the suit appealed to a superior court, and the plaintiffs continued to act for the defendant and conducted the appeal on his behalf up to the 1st of October, 1862. By the Manx statute law an action on simple contract brought in the temporal courts of the island must be commenced within three years of the cause of action. The plaintiffs brought an action in one of the Manx courts more than three years after October, 1862, and the court decided that the action was barred by the statute. The plaintiffs commenced an action in this country in January, 1868, to which the defendant pleaded—1. The judgment of the Manx court. 2. The English statute of limitations:—

Held,—1. That, as the Manx statute barred the remedy only and did not extinguish the debt, the judgment of the Manx court was no bar. 2. That, under the circumstances, there was a continuous employment of the plaintiffs; and that therefore none of the items were barred by the statute of limitations.

THE writ in this action was issued on the 9th of January, 1868.

Declaration for work and labour.

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Pleas: 1. Never indebted. 2. That the alleged cause of action did not accrue within six years before suit. 3. That the plaintiffs ought not to be admitted to say the debt is due, because they brought an action for the same cause in the Dempster Court of Douglas in the Isle of Man, and such proceedings were had in that action that it was considered by the judgment of the court that the defendant did not owe the debt, and the said judgment still continues in full force, wherefore the defendant prays judgment if the plaintiffs ought to be admitted against the judgment of the said Court of Man to say the money is payable by the defendant to the plaintiffs.

Issue was joined on the pleas, and the plaintiffs also demurred to the third plea on the ground that it was not alleged that the judgment of the Manx Court was final between the parties.

Joinder in demurrer.

At the trial before Blackburn, J., at the sittings in Middlesex in Trinity Term, 1868, it appeared that the plaintiffs were attorneys and advocates in the Isle of Man, and the action was brought for professional business done for the defendant. The principal part of their bill was for a suit commenced in 1858, the first item being:—

	£	s.	d.
"1858. March 25. Between Edward Corram and Wife, petitioners, *v.* John Quine, defendant. In Consistorial Court. Retainer and instructions . . .	0	8	0
This was continued from time to time, and in 1861 was dismissed. The item of charge being—			
"1861. April 25. Appearance and arguing case, suit dismissed with costs	1	1	0
The amount of the bill up to this date being .	37	12	3
The next item in the bill was—			
"1861. September 30. On appeal to Staff of Government. Retainer and instructions . . .	0	8	0
"1862. July 3. Appearance, and adjourned to next Court."			
The aggregate then being	45	10	3

On the 1st of October, 1862, the plaintiffs dissolved partnership,

and Adams continued the suit on behalf of the defendant till its end.

On the 30th of October, 1865, the plaintiffs commenced an action jointly against the defendants in the Dempster Court of Douglas, Isle of Man, for the costs of suit up to the 1st of October, 1862, and the defendant relied on the Manx statute of limitations, which enacts "that actions of debt, grounded upon any trading, contract, or demand, without specialty, which shall be sued or brought in any of the temporal courts of this isle, shall be commenced and effectually prosecuted within the time and limitation hereinafter expressed, that is to say, within three years next after the cause of such action, plaint, or suit, and at no time afterwards." Judgment was given for the defendant, the Dempster being of opinion that the debt was barred by the statute of limitations; holding that there being two distinct contracts, the first with the two plaintiffs the second with Adams alone, when the latter was recognized as the advocate to proceed with the suit, the contract with Harris and Adams was at an end, and the three years began to run from that date.

A verdict was directed for the plaintiffs for the amount claimed, with leave to the defendant to move.

A rule was obtained pursuant to the leave, to shew cause why the damages should not be reduced to 7*l.* 18*s.* (1), or such sum as the Court might think proper, on the ground that the judgment given for the defendant in the Manx court, or the plea of the English statute of limitations, was a bar to the plaintiffs' claim or some part thereof; and why the Court should not amend the third plea; the demurrer to be argued with the rule.

R. G. Williams, for the plaintiffs. The Manx statute, beyond all question, bars the remedy in the Manx courts only, and does not extinguish the debt; it is therefore no bar to the present action: Story's Conflict of Laws, ss. 576, 577 (though in a note it is said that Hertius was of a different opinion), *Huber* v. *Steiner*. (2) Prescription of suit, or limitation of action, has been long settled by the courts of this country to be part of the lex fori only: see per Sir J. Jervis,

(1) The amount of the costs due to the plaintiffs as to the appeal.

(2) 2 Bing. N. C. 202.

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delivering the judgment of the Privy Council in *Ruckmaboye* v. *Mottichund.* (1)

[HAYES, J., cited *British Linen Company* v. *Drummond* (2), as to the same effect.]

Donn v. *Lippman* (3) shews that the action cannot be affected by the judgment in the foreign court. The judgment was only on the point that the action was barred in the Manx Court; and it was not a decision on the merits. In *Bank of United States* v. *Donnally* (4), Story, J., says "As the contract, upon which the original suit was brought, was made in Kentucky, and is sought to be enforced in the state of Virginia, the decision of the case in favour of the defendant upon the plea of the statute of limitations will operate as a bar to a subsequent suit in the same state; but not necessarily as an extinguishment of the contract elsewhere, and especially in Kentucky." So in *Garcias* v. *Ricardo* (5) a judgment of a foreign court not on the merits was held no bar; and this case is cited as authority for that proposition in Westlake's Private International Law, p. 376. As to the English statute of limitations, the plaintiffs were entitled to recover for the whole of the business; there was one continuous employment. *Wadworth* v. *Marshall* (6) will be relied on contrà, but it is distinguishable.

[LUSH, J. That case only shews that an attorney may refuse to proceed in a cause without advances from the client; but it is not the less one contract if he does proceed.]

Whitehead v. *Lord* (7) shews that if the suit be not concluded at the time of action brought, whatever stage it may be in, none of the items of the bill are barred by the statute.

Baylis, for the defendant. The matter has been already litigated in the Manx court; and the principle applies, nemo debet bis vexari pro eâdem causâ. The local legislature has full power over any contract made within its jurisdiction: *Phillips* v. *Eyre.* (8)

[COCKBURN, C.J. The colonial statute, in that case, expressly took away the cause of action; here it only bars the remedy in the local courts.]

(1) 8 Moo. P. C. at p. 35.
(2) 10 B. & C. 903.
(3) 5 Cl. & F. 1, 13.
(4) 8 Pet. U. S. Rep. 361, 370.
(5) 14 Sim. 265.
(6) 2 C. & J. 665.
(7) 7 Ex. 691; 21 L. J. (Ex.) 239.
(8) Ante, p. 225.

Secondly, the chief part of the plaintiff's demand is barred by the English statute of limitations. The suit was at an end when judgment was given in the original court, and the items anterior to this are not kept alive by the renewed litigation when the plaintiff appealed: *Rothery* v. *Munnings* (1); *Phillips* v. *Broadley*. (2)

[BLACKBURN, J., referred to *Harris* v. *Osbourn*. (3)]

COCKBURN, C.J. I am of opinion that the rule must be discharged, and it is conceded that judgment on the demurrer must be given for the plaintiffs. On the question as to whether the judgment on the plea in the Manx court is a bar to bringing an action in the courts of this country, I think we are bound by authority that it is not; *Huber* v. *Steiner* (4), and other cases, having decided that such a statute of limitations as the present simply applies to matter of procedure, and not to the substance of the contract. If the matter were res integra and I had to form an opinion unfettered by authority, I should be much inclined to hold, when, by the law of the place of contract, an action on contract must be brought within a limited time, that the contract ought to be interpreted to mean, "I will pay on a given day, or within such time as the law of the place can force me to pay." But the law being as I have stated, there is no judgment of the Manx court barring the present action, as there was no plea going to the merits, according to the view which we are bound to take of the Manx statute of limitations, and the issue which the Manx court decided in favour of the defendant is not the same issue as is raised in the present action. On the other branch of the case, the defendant's counsel contended that the suit was terminated when it was dismissed in the court below, and that the statute of limitations began to run from that time. If nothing had taken place after that judgment, and the other items of the bill had no reference to the suit, that would be so; but as soon as the defendant instructed the plaintiffs to appear for him in the appeal, and they did so, it is nothing more nor less than a continuation of the original suit, although the plaintiffs might have refused to go on.

(1) 1 B. & Ad. 15.
(2) 9 Q. B. 744.
(3) 2 C. & M. 629.
(4) 2 Bing. N. C. 202.

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BLACKBURN, J. I am of the same opinion. The Manx statute of limitations applies to the conduct of the suit, and therefore comes within the category of lex fori, and not lex contractûs; therefore the plea could not have been amended so as to be a bar to the present action, although brought on a Manx contract. But it was said the plea, if amended according to the facts, would shew that the Manx court had determined the matter, and that the matter ought not to be litigated again in the courts of this country; and, no doubt, wherever it can be shewn that a court of competent jurisdiction has decided the matter, the plaintiff is estopped from disputing the decision, or litigating the matter in another court, while the decision of the first court remains unreversed. But, in the present case, all that the Manx court decided was, that in the courts of the Isle of Man the plaintiffs could not recover. If the plaintiffs could have shewn, as was attempted in *Huber* v. *Steiner* (1), that the law of the Isle of Man extinguished the right as well as the remedy, and this had been the issue determined by the Manx court, that would have been a different matter. On the other question, it has been decided as long ago as *Harris* v. *Osbourn* (2) that the conduct of a suit is an entire contract, and the attorney can ordinarily only sue at the end of the litigation. No doubt, primâ facie, the termination of a suit is when judgment is given in the court in which the action is commenced; but when an appeal is brought, and the same attorneys continue to conduct the suit on appeal, that is a continuation of the original suit, and what primâ facie was a termination of the contract ceases to be so.

LUSH, J. I am of the same opinion. Had the Manx statute of limitations been analogous to our statute (3 & 4 Wm. 4. c. 27) as to real property, and had extinguished the right after the limited time and not merely barred the remedy, there would have been good ground for defence in this court. But the Manx law is like our statute of limitations, and bars the remedy only; and all that was decided in the Manx court was, that the action could not be maintained there. On the other point, I agree with what has been said, that the conduct of the suit on appeal is but

(1) 2 Bing. N. C. 202. (2) 2 C. & M. 629.

a continuation of the original contract to conduct the suit ad finem.

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HAYES, J., concurred.

Rule discharged.

Attorneys for plaintiffs: *Johnson & Weatheralls, for Copeman, Liverpool.*

Attorneys for defendant: *Gregory, Rowcliffes, & Rawle, for Bremner, Liverpool.*

[IN THE EXCHEQUER CHAMBER.]

June 14.

ENGELL *v.* FITCH AND OTHERS.

Vendor and Purchaser—Sale of Real Estate—Measure of Damages for Breach of Contract by Vendor.

The defendants, mortgagees of a house with a power of sale, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The plaintiff soon afterwards contracted for a resale at an advance of 10*l*. On investigation the title was satisfactory, but on the plaintiff requiring possession before completing the purchase, it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to have ousted him by ejectment, but they refused to complete the sale. On this the plaintiff brought an action for a breach of the contract of sale:—

Held (affirming the judgment of the Court of Queen's Bench), that, as the breach of contract arose, not from inability of the defendants to make a good title, but from their not having taken the necessary steps to secure the possession, the case did not come within the principle of *Flureau* v. *Thornhill* (2 W. Bl. 1078), and the plaintiff was entitled to recover not only his deposit and the expenses of investigating the title, but also damages for the loss of his bargain; and that the measure of damages was the difference between the contract price and the value at the time of the breach of contract; and that the profit which it was shewn the plaintiff could have made on a resale, uncontradicted by other evidence, was evidence of this enhanced value; and that the plaintiff was therefore entitled to recover the 10*l*.

APPEAL from the decision of the Court of Queen's Bench, discharging a rule to enter a verdict for the defendants.

First count, that the defendants, on the 7th of November, 1865, caused to be put up for sale by auction the leasehold of two houses, Nos. 48 and 49, Great Sutton Street, Clerkenwell, subject,

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amongst others, to the following particulars and conditions of sale; that the purchaser should pay a deposit of 10 per cent. on the purchase money immediately after the sale, and the remainder on the 26th of December, 1865, on which day the purchase should be completed; and that possession of the house No. 48 should be given by the defendants on the completion of the purchase; and that on payment of the purchase money the defendants should execute a proper assignment; that the plaintiff became purchaser for 195*l.*; that all conditions precedent, &c., have happened, but the defendants refused to perform their agreement, whereby the plaintiff has been deprived of great gains and profits, and has lost the use of the money paid by him as deposit, and all other moneys furnished for the completion of the purchase, and has lost the expenses incurred in investigating the title of the defendants, and preparing to perform the agreement on his part.

Second count, for money had and received, interest, and on an account stated.

The defendants pleaded to the first and second counts payment into court of 20*l.* and 19*l.* 10*s.* respectively.

The plaintiff replied to the first plea, damages ultra, on which issue was joined; and as to the second plea, took the money out of court in satisfaction, &c.

The following are the material facts as stated on appeal:—

1. The defendants were the trustees of a building society. On the 7th of November, 1866, they caused to be put up for auction two leasehold houses, Nos. 48 and 49, Great Sutton Street, Clerkenwell, which had been mortgaged to them as trustees of the society, with a power of sale, which power they had become entitled to exercise, and under which they were acting.

The following are the material parts of the particulars and conditions of sale:—

"By order of the mortgagees.

"An unusually eligible short leasehold property.

"Particulars and conditions of sale.

"Two superior and most substantially built houses and premises, Nos. 48 and 49, Great Sutton Street, Clerkenwell, which will be sold by auction by Messrs. Tebb, Brothers, on Tuesday, the 7th of November, 1868.

"Particulars" [after giving the situation, number of rooms, &c.

	Per annum. £	s.	d.
"No. 48. Possession will be given on completion of the purchase, but of the value of	100	0	0
"No. 49. Is at present let to old-standing weekly tenants, at very inadequate rents, amounting to 32s. per week, but would readily let to a yearly tenant, paying taxes, at	90	0	0
	190	0	0
"Held on lease direct from the Charterhouse for 21 years, from the 29th September, 1859, at a ground rent of	75	0	0
	£115	0	0

[On the back of the particulars of sale.]

"Conditions of Sale.

"2. That the purchaser shall pay down immediately into the hands of the auctioneer a deposit after the sale of 10*l.* per cent. upon and in part payment of his purchase money, and shall pay the remainder thereof on or before the 26th of December, 1865.

"4. On payment of the remainder of the purchase money, the purchaser shall have an assignment of the property at his expense, and shall be entitled to the rents and profits from the day of actual completion. If from any cause whatever the purchase is not completed on the 26th of December next, the purchaser shall pay, with the balance of his purchase money, a proportionate part of the accruing quarter's rent; as the vendors are mortgagees, they will only covenant that they have done no act to encumber.

"5. All objections or requisitions as to the title or conveyance (if any) shall be delivered, in writing, to Messrs. Lewis & Sons, 7, Wilmington Square, W.C., the vendors' solicitors, within seven days after the delivery of the abstract, and in default of such delivery, and as to all matters not therein specifically objected to, the title shall be considered as complete; and every answer to any original or subsequent statement of objections or requisitions shall, within seven days after the delivery of such answer, be replied to by a statement in writing delivered as aforesaid, and any such answer not so replied to shall be considered as satisfactory and final; and in case any objection or requisition shall be so delivered, and the vendor shall be unable or unwilling to comply therewith or remove the same, the vendor is to be at liberty, by notice in writing, under the hand of the vendor's solicitors, to rescind the contract, and on receiving back the abstract, to return the deposit-money, without interest, costs, or other compensation, notwithstanding any attempt made to satisfy, remove, or comply with any such objection or requisition, or any negotiation or litigation in reference thereto, or other proceeding consequent on the sale."

The leases of the two houses were knocked down to the plaintiff as highest bidder for 195*l.*, and he paid the deposit, 19*l.* 10*s.*, required by the conditions of sale.

It was proved by the defendants at the trial that at the time of the sale the mortgagor, Holdsworth, occupied No. 48.

On the 11th of November, 1865, the abstract of title was

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delivered to the plaintiff's attorney, and he attended at the office of the defendants' attorneys and inspected the deeds.

On the 28th of November, the plaintiff's attorney sent in requisitions of title to the defendants' attorneys, which the latter duly answered on the 13th of December following.

On the 30th of November, the plaintiff's attorney wrote to the defendants' attorneys, stating that his client, the plaintiff, had resold the premises, and asked defendants' attorneys to produce the deeds to Mr. Richardson, the solicitor for Mr. Gilbert, the new purchaser from the plaintiff, to which the defendants' attorneys assented.

The plaintiff had resold the leaseholds on the 17th of November, to Mr. Gilbert at an advance of 105*l.*

Mr. Richardson afterwards attended the defendants' attorneys and examined the deeds, and on the 15th of December sent to them, with their consent, further requisition sof title, of which the 11th was as follows:—"One of the houses being in possession of Holdsworth, possession must be given on completion:" and on the 8th of January, 1866, the defendants' attorneys sent to Mr. Richardson the following answer:—"We cannot give possession of this house."

On the 15th of January, 1866, the plaintiff's attorney wrote to the defendants' attorneys:

"I have seen Mr. Richardson herein. The only reason the matter is delayed is your not being able to give possession, and as I would not, in my client's behalf, consent to complete without having possession given to us as stated in particulars of sale, matters would not be improved by my proceeding on their behalf to carry out the contract. What is the difficulty in ousting the tenant?"

On the 1st of February the defendants' attorneys wrote to the plaintiff's attorneys:

"The purchaser having made an objection, which the vendor is unable and unwilling to comply with, the vendors rescind the contract, and the purchaser can obtain back his deposit by application to the auctioneer, Mr. Tebb, at 139, Cheapside."

On the 9th of February the plaintiff's attorney wrote to the defendants' attorneys:

"Please specify the objection upon which the vendors affect to

rescind the contract, and the grounds upon which they allege their inability to comply with it."

On the 16th of February the defendants' attorneys wrote:

"The purchaser requires possession to be delivered up. Mr. Holdsworth, the mortgagor, denies the right of the vendor to possession, and the vendors will have to incur considerable expense to obtain the same. The vendors have, therefore, rescinded the contract."

On the 31st of January, 1866, the defendants commenced an action of ejectment against Holdsworth to recover possession of the house, No. 48, to which action Holdsworth appeared; and on the 24th of the following April, they got judgment against him, that they were entitled to possession from the 31st of January.

The mortgage deed to the trustees was dated the 1st of August, 1862, and contained a power of sale and re-entry, and it was admitted at the trial that the power of sale had been duly exercised by the defendants.

The plaintiff commenced this action on the 17th of March, 1866, and it was tried at the sittings in Middlesex, in Hilary Term, 1867. The plaintiff sought to recover his deposit and damages for the defendants' breach of contract.

It was admitted at the trial, that the money paid into court was sufficient to cover every claim of the plaintiff, except in respect of the loss of the value of his bargain, and a verdict was taken for the plaintiff by consent for 105*l.* beyond the money paid into court, with leave to move to enter the verdict for the defendants.

The defendants accordingly, on the 21st of January, 1867, obtained a rule nisi, on the ground that the plaintiff was not, under the facts of the case, entitled to recover in respect of the profit of re-sale or goodness of his bargain.

This rule the Court of Queen's Bench, on the 17th of April, discharged. (1)

The question for the opinion of the Court of Appeal is, whether or not the plaintiff is entitled, under the facts of the case, to recover in respect of the profits he would have made in the re-sale if the defendants had completed their contract with the plaintiff.

(1) Law Rep. 3 Q. B. 314.

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Manisty, Q.C. (with him *Beasley*), for the defendants (1), contended that the general rule of law was, that on the contract of sale of real property, apart from all question arising on a condition for rescinding, the vendor is not liable, in the event of not completing his contract, to make compensation to the vendor for the loss of his bargain; that the case was within the rule as enunciated in *Flureau* v. *Thornhill* (2), and not within the exception engrafted on it by *Hopkins* v. *Grazebrook*. (3) The rule was approved, and the propriety of the exception questioned, in Sugden's Vendors and Purchasers, 14th ed. pp. 359—360; and in Sedgwick on Damages, 4th ed. pp. 206, 209—210. He cited and commented upon *Sikes* v. *Wild* (4); *Walker* v. *Moore* (5); *Worthington* v. *Warrington* (6); *Pounsett* v. *Fuller* (7); *Locke* v. *Furze* (8); *Robinson* v. *Harman*. (9) He contended, secondly, that even if the plaintiff was entitled to damages beyond the sum paid into court, he could not recover for the loss of the profits of a re-sale, as that was not in the contemplation of the parties within the rule in *Hadley* v. *Baxendale*. (10) He also cited on this point, *Redmayne* v. *Great Western Railway Company*. (11)

Field, Q.C. (with him *Clare*) for the plaintiff, was not heard.

KELLY, C.B. This is an action by the vendee of a leasehold estate against the vendors, and the declaration alleges that the defendants refused to complete the purchase and deliver up possession, and that the plaintiff has suffered a certain amount of special damage in consequence. There is no plea of rescission of the contract; the only plea being a plea of payment into court,

(1) The argument was commenced at the sittings after Easter Term, May 10, and was adjourned at the suggestion of the Court, in order, if possible, to have the case amended by stating what was the value of the property at the time of the breach of contract. The case remained, however, without amendment, as the parties could come to no agreement. *Field, Q.C.*, intimated that he should contend that the fact of the re-sale at an advance of 105*l.*, uncontradicted by other evidence, was evidence of the increased value.

(2) 2 W. Bl. 1078.

(3) 6 B. & C. 31.

(4) 4 B. & S. 421; 32 L. J. (Q.B.) 375.

(5) 10 B. & C. 416.

(6) 8 C. B. 134; 18 L. J. (C.P.) 350.

(7) 17 C. B. 660; 25 L. J. (C.P.) 145.

(8) 19 C. B. (N.S.) 96; 34 L. J. (C.P.) 201; on appeal, Law Rep. 1 C. P. 441.

(9) 1 Ex. 850; 18 L. J. (Ex.) 202.

(10) 9 Ex. 341; 23 L. J. (Ex.) 179.

(11) Law Rep. 1 C. P. 329.

with a replication of damages ultra. It is admitted that the money paid into court is sufficient to cover the expenses of investigating the title, &c., and the only question is, whether the plaintiff is entitled to recover damages in respect of the loss of profit which he would have made by a re-sale of the property. The statement in the case is, that a verdict was taken for the plaintiff by consent for 10*5l.*, beyond the money paid into court, with leave to move to enter the verdict for the defendants; and the ground on which the rule was obtained is, that the plaintiff was not, under the facts of the case, entitled to recover in respect of the profit of re-sale or goodness of his bargain. If the question was whether, as a general proposition of law, the vendee on a breach of his contract by the vendor is entitled in all cases (always excepting cases within the ruling in *Flureau* v. *Thornhill*) (1), to recover for the loss of the value of any bargain for re-sale, we should at once hold that, as a general proposition, such damages cannot be recovered. But we must look at the circumstances of the particular case, and give such a meaning to what the parties appear to have done as is consistent with their intention and the justice of the case. If we look at what took place at the trial, we find that the plaintiff gave evidence that he had entered into a bargain for a re-sale of the premises at an advance of 10*5l.*, and no evidence was given by the defendants in a contrary direction to shew that this bargain did not represent the market value of the premises, and we think under such circumstances the fact of the plaintiff's bargain must be taken as evidence of the market value of the property.

What we then have to consider is, when a vendor, not by reason of any want of title, but by reason of not choosing to oust the mortgagor, refuses to complete, and the action is really for a breach of contract to deliver possession, whether under such circumstances the vendee is entitled to recover the difference between the contract price and the market value at the time of breach. We think the vendee is entitled to this difference. And I may add that we think this would be so in all cases of this kind, excepting those within the rule of *Flureau* v. *Thornhill* (1), which is confined to the single case of failure of title. We adopt the general rule as enunciated by Parke, B., in *Robinson* v. *Harman* (2), "that the

(1) 2 W. Bl. 1078. (2) 1 Ex. at p. 855; 18 L. J. (Ex.) at p. 204.

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rule of the common law is that, when a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed. The case of *Flureau* v. *Thornhill* (1) qualified the rule of the common law. It was there held that contracts for the sale of real estate are merely on condition that the vendor has a good title; so that when a person contracts to sell real property there is an implied understanding that, if he fail to make a good title, the only damages recoverable are the expenses which the vendee may be put to in investigating the title."

We are far from wishing to throw any doubt on the decision in *Flureau* v. *Thornhill* (1); it took place nearly a century ago, and there has been a long series of decisions since, and the practice of conveyancers has been founded upon it. But what is the doctrine laid down by that case? Simply, that under a contract between vendor and purchaser of real estate, the vendor shall not be liable for any other damages, beyond the deposit and costs of investigating the title, when he is unable to perform his contract by reason of his inability to make out a good title. That has been truly called an exception or qualification of the rule of common law (I need not go so far as to call it an anomaly), founded entirely on the difficulty that a vendor often finds in making a title to real estate, not from any default on his part, but from his ignorance of the strict legal state of his title. That was all that was decided in *Flureau* v. *Thornhill* (1), and we are far from dissenting from that proposition in the most extensive terms it can be laid down.

Is the present breach of contract within the rule? The defendants contracted to sell and deliver possession on the completion of the purchase and payment of the purchase-money on the 26th of December; the contract was not completed on that day, and certain requisitions were made, and the fifth condition was relied on by the defendants, but there is no plea to meet that view of the case; the requisitions were abandoned, and the contract went off on a different ground, and not only was there no doubt about the title, but the case shews that the defendants had a good and valid title. In the month of January, there being some difficulty in obtaining possession, the defendants being mortgagees with a

(1) 2 W. Bl. 1078.

power of sale, and the mortgagor being in possession, some correspondence ensued, which shews that the plaintiff, so far from being unwilling to accept the title or give time, or objecting to the title, demands immediate possession, and his solicitor writes inquiring "What is the difficulty in ousting the tenant?" It is the defendants, and not the plaintiff, who put an end to the proceedings, on the ground of rescinding the contract; but they had no power to do so, and if they had power there is no plea setting up this defence. In the following March this action is commenced, the foundation of it being that there was a contract by the defendants to sell and give possession which they had failed to carry out; and the question is, whether, looking at the whole circumstances, the plaintiff is entitled to recover the difference between the contract price and the market value of the property at the time of breach. But there is a preliminary objection raised by the defendants that this market value is not shewn, and that a re-sale cannot be taken into consideration as within the contemplation of the parties. On the latter point, we are inclined to agree with the defendants: but surely the fact that there was a re-sale at an enhanced price is evidence that the market value had advanced to that extent, there being no evidence to the contrary, and no cross-examination on the subject. Indeed, as the verdict was taken by consent, it cannot now be disputed that there was this advance in price, and the question left for us is, in fact, whether the plaintiff is entitled to recover in respect of this advance in the market value. No case has been cited in which the purchaser of real property has been held disentitled to recover damages like the present, except in the case of *Flureau* v. *Thornhill* (1), and the cases which followed it, and upon the one ground of the vendor's inability to make out a title; and there is no authority to shew that when the breach of contract has been on any other ground, any other rule as to damages applies in contracts as to the sale of real property than that which prevails in the ordinary case of a breach of contract. Upon this I cannot do better than refer to what was said by the Lord Chief Justice in the Court of Queen's Bench. (2) "There is an obvious difference between the case of a man who, being in possession and the undoubted owner of real property, is unable to make out a

(1) 2 W. Bl. 1078. (2) Law Rep. 3 Q. B. at pp. 329–330.

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marketable title, and that of one who, not being owner, but having only a contract for the purchase of real estate, takes upon himself to sell it to another, as his own, and as if the title were his to convey. The difficulty of making out a title, which exists in the one case and forms the foundation of the rule, and the justification of the departure from ordinary principle, is wholly wanting in the other. It is upon this distinction, as it appears to us, that the Court of King's Bench proceeded in *Hopkins* v. *Grazebrook*. (1) . . . It merely comes to this, that a man, who undertakes to sell what he has not secured the command of, has only himself to blame, and is not protected by a rule which has reference solely to the difficulty in making out title. The matter is put on its true footing by Parke, B. in *Robinson* v. *Harman* (2), where precisely the same point having arisen, the Court, without hesitation, adopted the principle of *Hopkins* v. *Grazebrook*. (1) Parke, B., there says, 'The rule of the common law is that, where a party sustains a loss by breach of contract, he is, so far as money can do it, to be placed in the same situation with respect to damages as if the contract had been performed.'" Now, if that rule applies to the present case, what damages will place the plaintiff in the same position as if the defendants' contract had been performed? If the contract had been carried out he would have been possessed of property of the increased value of 105*l.*, it follows that he is entitled to damages to that amount. Not, I repeat, because he happens to have made such a good bargain of re-sale, but because, as the case is put before us, we must take this bargain as evidence of the market value, no contrary evidence having been given.

It is said, however, that this is contrary to the decision in *Hadley* v. *Baxendale*. (3) Now, without adopting all the expressions used in the Court below on this subject, or saying that in all cases parties to the sale of real estate must be taken to have contemplated a re-sale, I think that if an increase in value has taken place between the contract and the breach, such an increase may be taken to have been in the contemplation of the parties within the meaning of *Hadley* v. *Baxendale*. (3) For these reasons, I think the plaintiff is entitled to recover the increased value, the case not being within

(1) 6 B. & C. 31.

(2) 1 Ex. at p. 855; 18 L. J. (Ex. at p. 204.

(3) 9 Ex. 341; 23 L. J. (Ex.) 179.

the exception in *Flureau* v. *Thornhill* (1), but within the general rule as to damages; and the defendants, having, imprudently perhaps, contracted to deliver possession on a certain day, and not having taken the precaution to guard against the contingency of the mortgagor not giving up possession, must be held liable for the breach of their contract; and the measure of damages is the difference between the contract price and the value at the time when the contract was broken. The judgment of the Court of Queen's Bench will, therefore, be affirmed.

CHANNELL and CLEASBY, BB., BYLES, MONTAGUE SMITH, and BRETT, JJ., concurred.

Judgment affirmed.

Attorney for plaintiff: *Engell.*

Attorneys for defendants: *Lewis & Sons.*

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June 25.

Pleading—Award—Res judicata.

Declaration for work done and materials provided, claiming 400*l.* Plea: Except as to 145*l.* 3*s.* 1*d.*, parcel of the money claimed, that the defendant ought not to be admitted to allege that at the commencement of this suit any more than the sum of 145*l.* 3*s.* 1*d.* was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because after the accruing of the causes of action and before suit, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of W. W. and agreed to be bound by his award as to such amount, and that W. W. awarded that the amount due from the defendant to the plaintiff was 145*l.* 3*s.* 1*d.* Demurrer:—

Held, that, as the plea did not profess to answer the entire claim of the plaintiff, but was pleaded only to the excess over the sum found to be due by the award, it was a good plea, inasmuch as the award precluded either party from saying more or less was due.

DECLARATION containing indebitatus counts for work done and materials provided, for money paid, for the conveyance of goods, for interest and money due on accounts stated, and claiming 400*l.*

Fourth plea: Except as to the sum of 145*l.* 3*s.* 1*d.*, parcel of

(1) 2 W. Bl. 1078.

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the money claimed, the defendant says that the plaintiff ought not to be admitted or received to claim or allege that at the commencement of this suit any more than the sum of 145*l.* 3*s.* 1*d.* was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because the defendant says that after the accruing of the causes of action in the declaration mentioned, and before this suit, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them before this suit they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of William Wills, and agreed to be bound by his award as to such amount; and that afterwards, and before this suit, the said William Wills, having taken upon himself the burden of the arbitration, and having heard and considered all that the plaintiff and defendant respectively had to allege, and all the evidence which they had to produce relating to the premises so referred, made his award in writing of and concerning the premises so referred to him as aforesaid, and thereby awarded that the amount due from the defendant to the plaintiff in respect of the causes of action was 145*l.* 3*s.* 1*d.*

Demurrer and joinder.

June 24. *Anstie,* in support of the demurrer. In answer to an admitted cause of action, the plea states an award without averring payment of the sum awarded: it is therefore bad. It may be that where on a reference an award has been made, payment of the sum awarded will be a good defence to an action founded on the original cause of action. But notwithstanding earlier dicta to the effect that an unsatisfied award, or even an agreement to refer, bars the original claim, the case of *Allen* v. *Milner* (1), where those authorities are reviewed, is decisive to the contrary. The same conclusion follows from the nature of the transaction. The effect of an award depends on the agreement to refer; that agreement may, if the parties see fit, at once release and extinguish the original debt, in consideration of the mere promise to refer or the promise to pay the sum which the arbitrator may fix: *Hall* v.

(1) 2 C. & J. 47.

Flockton. (1) But such an agreement must be express, and will not be implied from a mere agreement to refer; and no such special agreement is stated in the plea. The ordinary agreement is an agreement on the one side to accept the payment in satisfaction of the original cause of action; and by the addition of the consideration contained in the mutual undertaking to refer, the sum paid becomes a valid satisfaction in law whatever may be the actual amount of the original debt. But until payment the agreement, though followed by an award, is only an award without satisfaction, and has no effect on the original cause of action. The arbitrator is in substance a person agreed on by the parties to state an account between them, and his award has the same and no greater effect than an account stated between themselves. The voluntary origin of the transaction distinguishes it from a judgment in an English court of law, which as an adjudication by the sovereign power merges the debt, and also from a foreign judgment, which is a proceeding in invitum, and being the act of a recognized foreign power, is, by the comity of nations, nearly assimilated in its effects to a judgment of a tribunal of the country. If in substance an unsatisfied award is no answer to the action, it does not mend the defence to plead it by way of estoppel. If it was an estoppel to the cause of action, the cause of action would in effect be gone, which cannot be maintained. But the award is in fact pleaded only to the amount of the cause of action—that is, to the damages. It may be that the award would be under ordinary circumstances evidence practically conclusive of the amount due, but this does not make it an estoppel. In *Newall* v. *Elliott* (2), Wilde, B., says there is a great difference between a thing being conclusive in evidence and an estoppel. As much might be said of an account stated in the ordinary way, which could not be pleaded, but would ordinarily be conclusive as evidence of the amount under the general issue. This is the proper way of using an award, and was the course adopted in *Whitehead* v. *Tattersall.* (3)

Jelf, contrà. This case is distinguishable from *Allen* v. *Milner.* (4) Here the plea is pleaded to the excess, there it was pleaded to the whole cause of action. The finding of the arbitrator, who is consti-

(1) 16 Q. B. 1039.
(2) 32 L. J. (Ex.) at p. 122.
(3) 1 A. & E. 491.
(4) 2 C. & J. 47.

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tuted the judge between the parties, is final and binding upon both. The plaintiff sues on the original cause of action, and the plea shews that he can recover only that which the arbitrator has found to be due to him. It may well be that the amount awarded by the arbitrator is by other pleas shewn to have been discharged; or if there are no such pleas on the record, the plaintiff may sign judgment for the sum excepted in the plea. There is no distinction between an award and a judgment as to its operation on the parties. This is pointed out in the notes to *The Duchess of Kingston's Case.* (1) In speaking of estoppels quasi of record, it is stated that though "no private individual can create a court whose sentence shall have operation on the persons or properties of others, yet there is no reason why he should not create one having operation on his own, unless, indeed, he introduce some term inconsistent with public policy. Thus, on the same ground on which a visitor's sentence is supported, stands the case of the trustees of a school dismissing the schoolmaster for misconduct, and the ordinary case of an arbitrator whose forum is a domestic one constituted by the parties themselves who are bound by its award." If the plaintiff is desirous of impeaching the validity of the award, he can set it out in the replication. In *Whitehead* v. *Tattersall* (2) an award given in evidence was held to be conclusive between the parties. In *Gascoyne* v. *Edwards* (3) it was held that an award may be pleaded in bar without an averment of the performance of the conditions imposed by it. *Parkes* v. *Smith* (4) is precisely in point.

Anstie was heard in reply.

Cur. adv. vult.

June 25. LUSH, J. This was a demurrer to a plea. [The learned Judge read the plea]. It is to be observed that the plea does not profess to be an answer to the entire claim, but to the excess over and above the amount of 145*l.* The question is, whether the plaintiff is concluded by the award from alleging that the entire amount was due to him. I am of opinion that he is concluded, and that the award is binding between the parties in all matters which it professes to decide. It was contended that an

(1) 2 Sm. L. C. 6th ed. p. 721.
(2) 1 A. & E. 491.
(3) 1 Y. & J. 19.
(4) 15 Q. B. 297; 19 L. J. (Q.B.) 405.

award is not an estoppel, that the parties are not concluded by an award, and that it is distinguishable from a judgment, which, it is admitted, would have bound the parties. The contention was, that it was so distinguishable, because an award was an adjudication by a tribunal appointed by the parties, and not one constituted by the sovereign power within the realm. It is impossible, to my mind, to suggest any good ground of distinction between these two, when we consider that the reason, why a matter once adjudicated upon is not permitted to be opened again, is because it is expedient that there should be an end to litigation. When once a matter has been decided between parties, the parties ought to be concluded by the adjudication, whatever it may be. I am at a loss to suggest any reason that would be applicable to the one, that would not be applicable to the other tribunal.

Several cases were cited which it was supposed were authorities in favour of the plaintiff, but which, I think, may be contended to be clearly authorities in favour of the defendant. It is not a new doctrine that an award is a bar. That is found in Comyn's Digest, Tit. Accord, D. 1; and there are several instances of it to be found in the books. The case of *Allen* v. *Milner* (1) was relied on, on the part of the plaintiff. When that case is examined it will be found to differ from the present in a most essential particular. There the money demand had been referred to arbitration. The arbitrator has found a given sum to be due from one to the other. That case was a money demand, as this is; the action was brought on the original consideration, but the plea, unlike the plea in this case, set up the award as a bar to the entire action. The plea was held bad, and for this reason, that an award upon a money claim does not alter the nature of the original debt; it leaves it remaining due. The amount which the arbitrator found to be due was for the original consideration. The award did not change the nature of the debt, consequently a plea which professed to answer the whole of the debt, and admitted a part of it was due, was a bad plea. That is the ground of that decision.

On the other hand, it is settled, where the claim is one for unliquidated damages, an award, which settles the amount, may be pleaded in bar to the entire action, although the plea, on the face

(1) 2 C. & J. 47.

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of it, shews that the money is not paid. In the case of *Gascoyne* v. *Edwards* (1) there was a general plea pleaded to the whole declaration, by which it was alleged that the parties had agreed to refer the amount of the damages to arbitration, and an award had been made, by which it was awarded that the defendant should pay the plaintiff 5*l.* to put the premises in repair. The plea, although it did not aver that the 5*l.* was paid, was held to be a good plea because an award, fixing the amount and creating a debt between the parties, extinguished the original demand for unliquidated damages. The principle upon which this was held a good plea is, that an award, professing to determine the matter, is binding upon both parties, and it as much precludes the parties from alleging anything contrary to the award, as a judgment would, on the ground that it is res judicata. If this action had been brought upon the award, it is clear the defendant would be precluded from saying the 145*l.* was not due, because the arbitrator found it was. Why is not a plaintiff equally prohibited from alleging that more is due when the amount has been found by the arbitrator? Each must be concluded by the finding. It is elementary knowledge that an award, good on the face of it, is binding and conclusive upon both parties to it until it is set aside. Nothing appears on the face of this plea to shew that the award is not perfectly good. It professes to adjudicate upon all matters referred, and it has decided finally the whole matter. In answer to the argument that the award may be bad, it is enough to say that if the award is bad it might be shewn by a replication setting it out. If it is not bad on the face of it, then, the parties not having moved to set it aside, it stands, and each party is prohibited from objecting to it. The plea is a perfectly good plea, and our judgment must be for the defendant.

The plea, no doubt, is in an unusual form, because it is pleaded by way of estoppel. It begins in the ordinary way of a plea of estoppel, that the plaintiff ought not to be admitted or received to say so and so. That I consider immaterial. The award is a bar, and it concludes the parties.

HAYES, J. I quite agree that this plea is good, although

(1) 1 Y. & J. 19.

pleaded in the form of an estoppel, but upon consideration I think it is a plea in bar, and, in truth, a plea to the merits. It is pleaded not to the whole of the demand, but only to the excess beyond the amount found by the arbitrator. It is objected that the plea is bad because it does not shew that the sum awarded has been paid. We have not the whole record before us, and, for anything we know, the money may have been paid into court.

The cases that were cited on both sides clearly shew the plea to be good. In *Whitehead* v. *Tattersall* (1) an action was brought on a covenant. It appeared that before action the plaintiff and defendant had agreed to refer to arbitration a dispute relating to the repairs of certain premises, and the referee had ascertained the amount of the dilapidations. That case was before the new rules of pleading. The defendant pleaded non est factum, and the award was held to be conclusive as to the amount of damages to which the plaintiff was entitled for the breach of covenant. The Court said the award was binding on the plaintiff, and therefore, on the defendant. Taunton, J., says: "The award of an arbitrator concludes the right, unless you can impeach the award." Therefore the award there was held conclusive with respect to the amount of damages. *Parkes* v. *Smith* (2) seems to me to be quite undistinguishable from the present. It was pleaded that the award of the arbitrator was conclusive on both parties, and it was contended that it was a matter of estoppel, and ought to be pleaded as estoppel; but the Court thought it was a matter in bar, and not a matter of estoppel. Coleridge, J., pointed out the distinction, and said the defence was that there was no cause of action, and not that, admitting a cause of action to exist, the plaintiff was estopped from setting it up. The plea in that case did not allege a payment of the sum found to be due by the arbitrator. Therefore it seems to me this case is not distinguishable from *Parkes* v. *Smith*. (2) In the case of *Allen* v. *Milner* (3) the plea was held bad because it was pleaded to the whole cause of action. It admitted that the amount found by the arbitrator was due, but did not shew that the plaintiff's claim in respect of it was answered. There is this difference between the cases: In the present case the

(1) 1 A. & E. 491. (2) 15 Q. B. 297; 19 L. J. (Q.B.) 405.
(3) 2 C. & J. 47.

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plea is pleaded to the excess of what the arbitrator found to be due. We do not know what has taken place as to the 145*l.* 3*s.* 1*d.*; all we know is, that the excess to which the plea is directed has been found by the arbitrator not to be due, and both parties are bound by the finding. Therefore, whatever the form of the plea, it would not be bad, because pleas are not governed by their beginning and by their ending, but by the substance of them. Therefore this is substantially a good defence to the action.

Judgment for the defendant.

Attorneys for plaintiff: *Skilbeck & Griffith.*
Attorney for defendant: *Moore.*

July 3.

STRINGER AND OTHERS *v.* THE ENGLISH AND SCOTTISH MARINE INSURANCE COMPANY, LIMITED.

Policy of Marine Insurance—Capture—Deposit of Value of Goods in Prize Court—Total Loss.

5 QB. 248
4 HL. 428
5 CPD 394
7 CP 577.
6 HL. 96
1 CPD 361, 8

The plaintiffs made insurance with the defendants on goods on board ship from Liverpool to Matamoras against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings," &c.; and the policy contained a clause that "it shall be lawful to the insured, &c., to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the subject matter of the insurance, without prejudice to this insurance, the charges whereof the company will bear in proportion to the sum hereby insured," and that "the acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment." While on her voyage, the ship was, on the 5th of November, 1863, seized by a cruiser of the United States of America, and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged a lawful prize. The plaintiffs at this time elected to treat the seizure as a partial loss. On the 16th of June, 1864, the prize court gave judgment against the captors, and decreed restitution of the ship and cargo. On the 1st of July the captors appealed. On the 12th of September the plaintiffs, who then knew for the first time that there was an appeal, gave notice of abandonment, which the defendants refused to receive. On the 7th of December, 1864, and the 9th of February, 1865, the plaintiffs informed the defendants that the Prize Commissioner had applied to the court to sell the ship and cargo. The sale of the goods could have been prevented by depositing the full value of the goods, or giving bail for them in the prize court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The plaintiffs and defendants declined to take either of these steps, and on the 25th of May, 1865, the ship and cargo were sold by order of the court:—

Held, that the prolongation of the litigation by the captors appealing was not

more than might have been reasonably anticipated when the ship and cargo were first libelled, and that the appeal did not amount to such a change of facts as would justify the assured in changing their election, and that the assured could not, by their notice of abandonment, make the loss by the seizure and detention a total loss; but that depositing the full value of the goods in paper currency or giving bail for them were acts which a prudent uninsured owner would not have adopted to prevent the sale, and that the sale was, therefore, a total loss occasioned by the seizure, for which the plaintiffs were entitled to recover.

SPECIAL CASE stated pursuant to an order of Nisi Prius.

The action was brought, on a policy of insurance for 5000*l.* effected by the plaintiffs with the defendants on goods, to recover for a total loss.

The declaration contained a special count on the policy, and also the common money counts for money had and received, and for money paid and expended, and for work done. The defendants pleaded payment into court of 1100*l.*, to which the plaintiffs replied it was not sufficient.

1. In the month of July, 1863, the goods which formed the subject matter of insurance in the policy were shipped on board the British ship, the *Dashing Wave*, then about to sail from Liverpool to Matamoras, in the empire of Mexico.

2. The insurance was effected by the plaintiffs on behalf of one Joseph Walsh, hereinafter mentioned as the owner of the goods. The policy stated the insurance to be upon goods valued at 11,500*l.* by the ship or vessel called the *Dashing Wave,* lost or not lost from Liverpool to Matamoras . . . including all risk of craft and boats from ship or vessel. And it contained, amongst others, the following clauses: "And touching the adventures and perils which the company is contented to bear and does take upon itself in the voyage so insured, they are of the seas, men of war, fire, enemies, pirates, rovers, thieves, jettisons, letters of mart and countermart, surprisals, takings at sea, arrests, restraints and detainments of all kings, princes, and people of what nation, condition, or quality soever, barratry of the master and mariners, and of all other perils, losses, and misfortunes that have or shall come to the hurt, detriment, or damage of the aforesaid subject-matter of this insurance, or any part thereof. And in case of any loss or misfortune it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in, and about the defence, safeguard, and

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recovery of the aforesaid subject-matter of this insurance, or any part thereof, without prejudice to this insurance, the charges whereof the company will bear in proportion to the sum hereby insured. And it is expressly declared and agreed that the acts of insurer or insured in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment."

3. The ship, with the goods on board, sailed on her voyage to Matamoras, where the goods were to have been delivered to the consignees.

4. At that time war was being carried on between the United States of America and the people of the Confederate States of America, and many of the ports of the Confederate States were blockaded by the fleet of the United States. The port of Matamoras is near to certain ports that were then blockaded, but being a Mexican port, did not belong and was not subject either to the United States or to the Confederate States, and was not occupied by the forces of either of the contending parties.

5. Vessels heavily laden, as the *Dashing Wave* was, cannot proceed right up to Matamoras, but are obliged to bring up at the anchorage at the mouth of the river, and here, about three miles from the Mexican territory of Matamoras, the *Dashing Wave* arrived and came to anchor on the 2nd day of November, 1863. Owing to the bad weather which then prevailed, it was impossible to communicate with the shore, and on the 5th of November the *Dashing Wave* was boarded by officers of two of the cruisers of the United States, who seized the ship and cargo as prize, on suspicion that the ship contained contraband of war, and took her with the goods on board to New Orleans, where she arrived on the 23rd of November.

6. A suit was immediately instituted by the captors at New Orleans, in a Prize Court of competent jurisdiction, against the ship and cargo for the purpose of having them adjudged a lawful prize. This suit was contested by Joseph Walsh, the owner of the goods insured in the policy, and on the 29th of November Joseph Walsh wrote and sent a letter to Stavert, Zigomala, & Co., of Manchester, who had shipped the goods on his behalf, informing them of the seizure of the ship and cargo, and of their having been

taken to New Orleans, and of the suit having been instituted against them, which letter reached Stavert, Zigomala, & Co., in the early part of the month of December, 1863.

7. The ship and cargo were detained at New Orleans under process of the Prize Court, pending the suit.

8. On the 24th of March, 1864, the case came on for hearing before the Prize Court at New Orleans, and on the 16th of June following judgment was given by the Court against the captors, decreeing restitution of the ship and cargo. The judgment was signed on the 22nd of June, and from the judgment the captors, on the 1st of July, 1864, appealed to the Supreme Court of the United States at Washington; and at the time when this action was brought the appeal was still pending.

9. By a process of the Prize Court at New Orleans, and in accordance with the law in force there, judgment of restitution was suspended, and it was further adjudged and ordered that the ship and goods should be, and the same were, further detained by the Court pending the appeal.

10. On the 12th of September, 1864, the plaintiffs addressed the following letter to the defendants:—"We beg to repeat the notice already given you, that the brig *Dashing Wave* having on board 302 bales and 50 cases of merchandize and other the goods by that vessel, valued at 11,500*l.*, and insured in the sums of 6500*l.* and 5000*l.*, on a voyage from Liverpool to Matamoras, by the policy of insurance effected by us with your office, under the date of the 10th of August, 1863, was captured and seized by the United States cruiser while prosecuting her voyage, and the brig and goods on board were taken to, and are still detained at, New Orleans, and that proceedings are still pending in the Supreme Court of the United States, or other American court, in reference to the goods so insured. And in consequence of such capture, seizure, and detention, we now, on behalf of ourselves and of Joseph Walsh, and of all persons interested in the goods and merchandize so insured, abandon to you the goods and merchandize, and all right, property, and interest therein, and all claim and demand of every kind to and in respect of the same, and claim immediate payment of a total loss on the policy. We also give you notice that interest will be claimed under the policy, and such further damages and

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compensation as the assured and parties interested may, under the circumstances, be entitled to claim from their underwriters."

11. To this the defendants replied:—"We are in receipt of your favour tendering an abandonment per *Dashing Wave*. In reply, I beg to decline accepting same, and formally give you notice that this company repudiates at present any liability under the policy. I also beg to inform you that the previous notice of abandonment stated by you to have been given to the company was never received."

12. No notice of abandonment had been given by the plaintiffs to the defendants previous to their letter of the 12th of September, but from and after that time all letters and communications on the subject which were received by the plaintiffs were from time to time communicated by them to the defendants.

13. The next communication from the plaintiffs to the defendants was the following:—"By advices recently received from New Orleans, it appears endeavours are being made there to sell the *Dashing Wave* and her cargo, and a meeting of the parties interested has recently been held at Liverpool for the purpose of arranging to give bond and prevent such sale. The result of this meeting was, that Mr. Dean, the managing owner, has been authorized to wait upon the Foreign Office and endeavour to prevail upon the authorities there to give such instructions as shall prevent the sale of the ship and cargo until the appeal be decided. But as it is uncertain whether the interference of the Foreign Office will be successful, we are instructed by our friends, for whom we effected a policy for 5000*l.* on goods by her, and which was underwritten by you, to inquire whether, in case such interference does fail, you will be willing to join in giving bond to the extent of the 5000*l.* covered by the above-named policy, in order to prevent such sale."

14. To this the defendants replied as follows:—"Dec. 9. In reply to your favour of the 7th inst. *re Dashing Wave*, I am instructed to inform you that the company, conceiving that they are not interested in the sale of the cargo, declines to comply with your request, and to interfere in any way in the matter."

15. In order to procure bail and to prevent the cargo being sold,

the plaintiffs again addressed the defendants as follows:—"Feb. 9, 1865. We have just received from our principals in this matter a copy of a letter addressed to them by Mr. Furstall, of New Orleans, who is acting on behalf of the parties interested in the goods insured by your policy, in the proceedings pending with a view to obtain the restoration of the property, and by their desire we beg to hand you the annexed extract of all that is material. We beg here again to draw your serious attention to the expediency of bailing this shipment (in concert with the other company with whom it is insured), and thus terminating many of the various risks to which you are at present exposed in reference to it, and which are pointed out in Mr. Furstall's letter. We have every reason to believe that these goods could be bailed and released without a reference to the remainder of the cargo or the ship. Allow us to request your immediate attention to this application, and we trust to hear from you to the effect that you are prepared to bail these goods, and thus enable them to be released and forwarded to their destination." Annexed to this letter was a copy of a letter from Mr. Furstall:—"New Orleans, Jan. 11, 1865. I continue of opinion that, in justice to the assured and for their own protection, the underwriters are the parties who should furnish the bail required to enable the *Dashing Wave* to proceed to Matamoras, and deliver her cargo as recommended by me in my letter of the 11th of August. Such a course, if it had been promptly adopted, would have, long ere this, put an end to all sea risks, cleared the underwriters from all claims from the assured, and confined their liability to the expenses of salvage, with a fair prospect of obtaining damages to cover same, and, more, should cargo and vessel be restored. A contrary course has been pursued, and I am sorry to say I see no prospect of a decision in this unfortunate matter for years to come; and whilst the delay is ruin to the assured, the underwriters, besides sea risks for so long a space of time, may have in the end in such a latitude as this a cargo of rotten or seriously damaged goods consequent on the detention thrown upon them. I see that the great objection to furnishing bail arises chiefly from the requirement of this government that the bonds shall be in Federal currency. Captain Scrales, the agent of Lloyd's for the *Sir W. Peel*, wrote me some time ago that his principals are quite

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alarmed at his having furnished bail in Federal currency, and on this subject I wrote Baring Brothers & Co., under whose instructions I furnished the bail required, as follows:—'From Captain Scrale's letter to me Lloyd's appear quite alarmed at the possibility of the appeal to Washington being successful, and of our paper currency improving to the gold standard when they may be called to meet the bail in question. I see no cause for such alarm when Lloyd's have it in their power to fix at once their eventual liability, to wit, by investing the proceeds of the steamer *Sir W. Peel*, and cargo now under their control, in U. S. Treasury bonds or in currency. Exchange to-day here is 275; at this rate it would only require 70,070*l.* to cover the bail of 856,417 dollars, and this might turn out in the end a brilliant operation, should the improvement in the value of paper money really take place as dreaded by Lloyd's.' Had Captain Scrales refused under the currency appraisement to furnish the bail required Lloyd's would have lost the control of the property, for cargo and vessel would have been sold under some pretence or other (as has already been the case with other prizes), and the proceeds deposited in Court, subject to a decision which may be pending for years."

16. To this the defendants replied February 17, 1865:—"In reply to your letter of the 9th inst. we have to inform you that we have nothing to add to our communication of the 9th of December, to which we beg to refer you."

17. At the time when the proceedings as to the *Dashing Wave* and the goods on board thereof was pending in the courts of the United States, the circuit and district courts exercised the jurisdiction of the prize courts.

18. On April 24, 1865, one Thorpe, a prize commissioner of the United States, addressed to the judge of the district courts of the United States the following report:—"I would respectfully call your attention to the prize brig *Dashing Wave* and cargo. She was captured on November 5, 1863; decree of restitution, June 16, 1864; petition of appeal, July 1; order allowing appeal to supreme court, July 2; order allowing F. de Lizaddi & Co. to bond part of cargo claimed by them consisting of 60,000 dollars in gold, July 2: order allowing Dweys, Oetting, & Co. to bond part of cargo claimed by them, July 8. But in neither case have these claimants availed

themselves of the orders. The prize still has all her cargo on board except the specie, which I believe is deposited in the southern bank of this city. The cargo is assorted merchandize, and with the vessel, after lying eighteen months at the levee, are in a most ruinous condition. The propriety of ordering an immediate sale is respectfully submitted to the honourable court."

On the same day the Court ordered that the brig *Dashing Wave*, her tackle, apparel, and cargo, including the gold seized on board the vessel be sold by the marshal, after a full compliance with the requisites of the law, the proceeds of the sale to be deposited as the law directs and held subject to the further order of the Court.

19. On the 26th of May, 1865, the ship and all the goods on board thereof, including the goods of the plaintiffs not having been redeemed by any of the claimants, were sold accordingly, and the proceeds paid into court to be detained pending the appeal, and such proceeds at the commencement of this action still remained in the court to abide the decision of the appeal.

20. At the time when the question arose as to giving bond or bail, in order to prevent the sale of the goods the currency in use in the United States was a certain paper currency consisting of paper dollars commonly called greenbacks, and the ship and the goods on board thereof were appraised in the paper currency, and if bond or bail had been given in order to prevent such sale it must have been given in such paper currency.

21. The paper currency was at and about the time aforesaid subject to great and sudden fluctuations in value, in consequence of the war in 4th par. of this case mentioned, and at or about the time the paper currency was at from 250 to 280, that is to say, 100 dollars in gold, or goods of the value of 100 dollars in gold, were worth from 250 to 280 dollars in the paper currency.

22. If bond or bail had been given for the goods in order to prevent the sale it must have been given in the paper currency at the rate aforesaid, that is to say, for every 100 dollars value in gold of the goods, bond or bail must have been given for from 250 dollars to 280 dollars in the paper currency.

23. If bond or bail had been given for the goods as in the last paragraph mentioned, and if the ultimate judgment of the appeal

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court had been in favour of the captors, and the bond or bail had become forfeit and payable, then if the paper currency had risen in value between the time of the giving such bond or bail and its so becoming forfeit as aforesaid, the parties so giving the bond or bail would nevertheless have had to discharge and pay the same in the amount for which it had been originally given, so that if the paper currency had, during such interval of time as aforesaid, risen to par, the parties so giving bail would have been compelled to discharge and pay the same at par, that is to say, they must have given from 250 dollars to 280 dollars in the paper currency, which would in such case have been equal in value from 250 dollars to 280 dollars in gold for every 100 dollars' worth of the goods, and conversely if the paper currency had, during such interval of time, fallen in value, they would have made a profit corresponding to the amount of such fall.

24. One Richard Simpson, a merchant of Manchester, shipped on board the ship the *Dashing Wave*, certain cotton goods, no question as to which arises in this case, nor has Richard Simpson any interest, directly or indirectly, in the decision hereof. The goods, as shipped by Richard Simpson, were of the value of 3000*l*., or thereabouts, and were insured against the perils of the seas, but were warranted free from capture or seizure or the consequences of any attempt thereat.

25. Richard Simpson from time to time received advices by letter from his agent at New Orleans, and he considered the question as to whether he should give bond or bail for the goods or allow the same to be sold. Richard Simpson ascertained from his agent the state of the paper currency, as stated in the preceding paragraphs in this case, and that bond or bail was required to be given in the paper currency, and in consequence of the great and sudden fluctuations which were at that time often taking place in the value thereof, he decided to allow the goods to be sold, and the same were sold accordingly. Up to the 23rd of January, 1869, Richard Simpson had not received anything whatever in respect of his goods, nor had he any expectation of receiving anything unless through the intervention of the British Government.

26. No application was made on behalf either of the plaintiffs or Richard Simpson to deposit the value of their respective goods in

lieu of giving bond or bail, nor was any inquiry made on behalf of either of them as to whether such deposit could have been made. If a deposit of the value of the goods had been made in the paper currency, and if between the time of the making of such deposit and the time when the ultimate judgment of the appeal court was given the paper currency had fallen in value, then on the ultimate judgment of the appeal court being given against the captors, the parties having deposited the value of the goods in the paper dollars would have received the same back reduced in value to the extent of any fall which might have taken place, but did not, in such interval of time as aforesaid; and conversely if the paper currency had risen in value, the parties having so deposited the value of the goods in the paper dollars would in such case have received the same back increased in value to the extent of such rise.

27. From the early part of the month of November, 1863, up to the month of July, 1864 (except during a few days in the month of November, 1863, about the time when Brownsville was taken when there was a panic in the market), goods similar to the goods in question in this case commanded much higher prices at Matamoras than at New Orleans, and goods of that description which were sold at Matamoras during the period of time realized considerable net profits on the English invoices, after deducting all charges and expenses, in some instances as much as from 60 per cent. to 70 per cent. net profit. The value of such goods at Matamoras did, however, during the period of time vary a good deal according to the chances of the war.

30. Since the commencement of this action the appeal has been heard and judgment therein pronounced affirming the judgment of the Prize Court.

31. The sum of 1100*l.* has been paid into court by the defendants to meet the case of an average loss, including expenses under the suing and labouring clause.

32. The Court was to have power to draw all inferences of fact.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiffs are entitled to recover for a total loss of the goods.

June 8. *Mellish, Q.C.*, with him *W. Williams*, for the plaintiffs.

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Sir G. Honyman, Q.C., with him *Cohen*, for the defendants.

The arguments sufficiently appear from the judgment of the Court. In addition to the authorities referred to in the judgment, the following cases were cited: *Farnworth* v. *Hyde* (1); *Naylor* v. *Palmer* (2); *Rosetto* v. *Gurney* (3); *Fleming* v. *Smith* (4); *Benson* v. *Chapman* (5); *Moss* v. *Smith*. (6)

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Blackburn, Mellor, and Lush, JJ.), was delivered by

BLACKBURN, J. By this case it appears that the plaintiffs had, in the year 1863, made insurance with the defendants to the amount of 5000*l.*, on goods valued at 11,500*l.*, per the ship *Dashing Wave*, from Liverpool to Matamoras, against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings, princes, and people," and the policy contained a provision that in case of misfortune "it shall be lawful to the insured, their factors, servants, and assigns, to sue, labour, and travel for, in and about the defence, safeguard, and recovery of the aforesaid subject matter of this insurance or any part thereof, without prejudice to this insurance, the charges whereof the said company will bear in proportion to the sum hereby insured. And it is expressly declared and agreed, that the acts of the insurer or insured in recovering, saving, or preserving, the property insured, shall not be considered a waiver or acceptance of abandonment."

We may observe that, while on the one hand such acts do not of themselves produce any such effect as that suggested in this provision: (see per Lord Abinger in *Roux* v. *Salvador*) (7), the provision itself does not, on the other hand, prevent such acts from having the effect properly due to them as evidence that the parties have made their choice. Being so insured, the *Dashing Wave* sailed, with the goods on board, and during the continuance of the risk she was, on the 5th of November, 1863, seized by a cruiser of the United States, and carried into New Orleans, where a suit was

(1) 18 C. B. (N.S.) 835; 34 L. J. (C.P.) 207.
(2) 10 Ex. 382; 23 L. J. (Ex.) 323.
(3) 11 C. B. 176; 20 L. J. (C.P.) 257.
(4) 1 H. L. C. 513.
(5) 2 H. L. C. 696.
(6) 9 C. B. 94.
(7) 3 Bing. N. C. at p. 287, cited post, p. 689.

immediately instituted by the captors in a Prize Court, against the ship and cargo, for the purpose of having them adjudged a lawful prize. It is clear at this time the cargo was, by one of the perils insured against, taken entirely out of the control of the assured, under circumstances which rendered it doubtful whether it would ever be restored, or if restored, at what period. Under such circumstances, the assured has a right to elect whether he will retain the property in himself and treat the loss as a partial one, or abandon it to the underwriters and claim for a total loss; and he is bound to make that election promptly, and where it is practicable, to inform the underwriters that he has so made it. This is very clearly explained by Gibbs, C.J., in *Gernon* v. *Royal Exchange Assurance Company* (1), and the regular mode according to mercantile usage of notifying such an election, is by giving notice of abandonment. We need not inquire, in the present case, whether it is the only mode, or how long the assured might have waited after hearing of the seizure of his goods before determining whether he would abandon or not; for we think it clear, as a matter of fact, that the owner of the goods did elect to treat the seizure as a partial loss, no doubt under the expectation that his goods would be soon restored to him, and that at Matamoras they would be of such a value as to make it his interest to keep them, coming on the underwriters for compensation for the detention and expense of getting back the goods, instead of coming on them for the whole insured value giving up the property to the underwriters in proportion to their insurance. The owner of the goods intervened, and conducted the litigation so successfully, that on the 16th of June, 1864, the Prize Court at New Orleans, gave judgment against the captors, and decreed the restitution of the ship and cargo. On the 1st of July, the captors appealed, and in consequence, the judgment of restitution was suspended till the decision of the court of appeal. It does not appear distinctly when the news of those proceedings arrived in this country; but on the 12th of September, 1864, the assured, who must have then known that there was an appeal, for the first time sent the defendants a formal notice of abandonment, which they, as is the usual course, refused to receive, and declined to interfere.

(1) 6 Taunt. at p. 387.

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After this time it is stated in the case (paragraph 12) all letters and communications on the subject which were received by the assured were from time to time communicated by them to the defendants.

On the 7th of December, 1864, and again on the 9th of February, 1865, the assured informed the underwriters that endeavours were being made in New Orleans to sell the ship and cargo, and that he was endeavouring to prevent the sale of the cargo; and requesting them to assist in giving bail to prevent it. The underwriters on each occasion refused to interfere. The case has been amended by stating the evidence as to what occurred, and giving the Court power to draw inferences of fact; and we think that in fact the sale of the goods which are the subject of this insurance, could have been prevented by depositing the value of these goods, or giving bail for them, in the Prize Court, without giving security for the ship and the rest of the cargo, but could not have been prevented in any other way; and that the underwriters had full opportunity to take either of those steps if they pleased, and declined to do so; and that the assured also declined to take either of those steps.

On the 24th of April, 1865, the Prize Court made an order that the ship and cargo should be sold; and on the 25th of May, 1865, they were sold, and the proceeds paid into court. The assured gave a fresh notice of abandonment, which was again formally refused, and this action was commenced; and the question is whether the plaintiffs can recover as for a total loss.

We think that this depends upon a question of fact, namely, whether, under the circumstances, the assured ought to have given bail to prevent the sale; but, before discussing the evidence set out in the case, it will be more convenient to consider how the point arises.

The assured having elected to treat the seizure and detention as a partial and not a total loss, and proceeded with the suit on their account, were bound by this election, and could not afterwards turn round and treat the same seizure and detention as a total loss. As is well pointed out in 2 Phillips on Insurance, s. 1669, 3rd ed. p. 370, 5th ed. p. 356, where the cargo still subsists in specie and may be recovered, the question depending on abandonment is, which

party should be at the risk of the market and the solvency of agents, neither of which, independently of the direct effect of the perils insured against, concerns the insurers. To allow the assured to change his election whilst the circumstances remain the same would enable the assured to treat the property as his as long as there was a prospect of profit from the rise in the market, and as the property of the insurers, so soon as there was a certainty of loss, which would be inequitable: qui sentit commodum sentire debet et onus.

But that election, though binding as long as the circumstances remain the same, does not prevent the assured from claiming for a total loss, if a change of circumstances occurs which makes the loss actually total. In *Roux* v. *Salvador* (1) Lord Abinger thus states the law: "If the assured prefers the chance of any advantage that may result to him beyond the value insured, he is at liberty to do so, but then he must also abide the risk of the arrival of the thing insured in such a state as to entitle him to no more than a partial loss." Lord Abinger, speaking with reference to the circumstances of the case before him, in which the question was whether the goods could have reached their destination, uses language not generally applicable, though the principle is. He then proceeds: "If in the event the loss should become absolute, the underwriter is not the less liable upon his contract because the assured has used his own exertions to preserve the thing insured, or has postponed his claim till that event of a total loss has become certain which was uncertain before."

In Phillips on Insurance, 3rd ed. vol. ii. c. 17, s. 12, pp. 367–379, the author collects the various authorities, English and American, on this subject with great learning, and also treats the subject with great force of reasoning. He comes to the conclusion (3rd ed. p. 371, 5th ed. p. 357, s. 1669), we think rightly, that the assured, having once by delay shewn that he did not mean to abandon, "loses the right of abandoning on the *same state of facts* relative to the *extent* and *degree* of the operation and effects of the perils insured against." He explains what he means by this in the following sections. He expresses an opinion that if an embargo or other detention were, in the result, to turn out much longer than was reasonably anticipated,

(1) 3 Bing. N. C. 287.

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the assured, though he might in the first instance have elected to treat the loss as partial, might, on discovering this, treat it as total, unless something had occurred in the interval to prejudice the underwriters in consequence of the delay, although the detention had never changed its nature, and by condemnation or sale been turned into a total destruction of the thing. We are unwilling to say that this could never be the case, but we think it can only be where it is shewn that the delay occasioned by the detention is much greater than could have reasonably been anticipated at the time of the election made, and we think that in this case the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and cargo were first libelled. We think, therefore, that the appeal on the 1st of July did not amount to such a change of facts as would justify the assured in changing their election, and consequently that the assured could not, by the notice of abandonment on the 12th of September, 1864, make the loss by the seizure and detention a total loss after having elected to treat it as partial only.

But we think the sale by the Prize Court stands on a very different footing. If, notwithstanding the intervention and opposition of the plaintiffs, the Prize Court in America had wrongfully condemned the goods, and they had been under that sentence sold, the case would have been identical with that of *Mullett* v. *Shedden* (1), where the very point decided was, that by the sale "the property was wholly lost to the owner, and therefore the necessity of any abandonment was altogether done away." And the principle is, as stated by Lord Abinger in the passage already cited from the judgment of the Exchequer Chamber in *Roux* v. *Salvador* (2), that, inasmuch as in the event the loss had turned out to be absolute, "the underwriter is not the less liable upon his contract because the assured has used his own exertions to preserve the thing assured, or has postponed his claim till that event of a total loss has become certain which was uncertain before."

But in the present case the sale was not under a condemnation, but because the assured did not give security to prevent the sale. The defendants had the fullest notice of what was about to happen, and had ample opportunity to interfere and give security so as to

(1) 13 East, 304. (2) 3 Bing. N. C. at p. 287.

6 H.L. 116

prevent the sale; but still the assured, if he by any means, such as he could reasonably be expected to use, could have prevented the sale, was bound to use them; and if the sale was directly occasioned by his default, though remotely by the seizure, he cannot recover against the underwriters on account of that sale. But the assured are not bound to use unreasonable exertions in order to preserve the thing insured; and if the giving of bail or deposit of the money would have exposed them to expense, or risk of expense, beyond the value of the object, or, as the same idea is often expressed, if the steps necessary to prevent the sale were such as a prudent uninsured owner would not have adopted, we think they were not in default, and the sale was then a total loss occasioned by the seizure.

The question is, therefore, one of fact.

The case has now been amended by setting out the evidence on this question, and giving the Court power to draw inferences of fact.

It appears that the assured might have prevented the sale by depositing the full value of the goods, but we think it can seldom be reasonable to require an assured to deposit the *full* value of the subject matter in a foreign court and country; and consequently that, without reference to the peculiarity arising from the state of the American currency, the assured were not bound to adopt that alternative.

They might have prevented the sale by giving security, and generally we think that it would be a reasonable thing to give security rather than allow the goods to be sold. But in this case, from the peculiarly fluctuating nature of the American currency at the time, those who became sureties must have bound themselves in the event of condemnation to pay the value of the goods estimated in paper dollars at a time when gold was at from 150 to 180 premium; and it was not improbable that they might be called upon to pay when gold was at par, thus being liable to pay from 150 to 180 per cent. more than the value of the goods.

No doubt it was also possible that when called upon to pay, gold might have been at a still higher premium, so that they would have been called on to pay less than the value, but we do not think it was reasonable to require the assured to enter into such a very

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speculative transaction. It is true that in the event, which since the commencement of this action has happened, of the judgment being affirmed, it would be quite immaterial for how much the security was given; but that could not be known at the time when the assured were called upon to determine whether they would give security. And we find that in fact an uninsured owner of part of the cargo, a Mr. Simpson, who had nobody's interest to consider but his own, did, after considering the question, decline either to deposit money or to give bail for his goods, and allowed them to be sold; which, though not conclusive, is strong evidence as to what course a prudent man would take.

We come, therefore, to the conclusion of fact, that the assured could not by any means, which they could reasonably be called on to adopt, have prevented the sale by the American Prize Court, which at once put an end to all possibility of having the goods restored in specie, and consequently entitled the assured to come upon their insurers for a total loss. Even then the assured were not bound to do so. If they had thought that it was more for their interest still to claim the proceeds of the sale in the hands of the American Court as their money, and come on the underwriters only for the partial loss, they might do so. But it is clear as a matter of fact that they elected to come upon the insurers for an indemnity for a total loss, and that by so doing the insurers when they have indemnified them, will be entitled to be subrogated for them, and get what they can out of the hands of the Americans for their own benefit: see *Randal* v. *Cockran* (1); *Mason* v. *Sainsbury* (2); *Yates* v. *Whyte* (3); *Wright* v. *Morley* (4); see also 19 & 20 Vict. c. 97, s. 5.

Whether this will ultimately turn out advantageous to the underwriters or not is a matter which concerns the parties only.

It only remains to add that the interest should be at the rate of 5 per cent. from the 25th of May, 1863, the date of the sale, to the day on which judgment is given.

Judgment for the plaintiffs.

Attorneys for plaintiffs: *Oliverson, Peachey, Denby, & Peachey.*

Attorneys for defendants: *Cotterill & Sons.*

(1) 1 Ves. Sen. 98.
(2) 3 Doug. 60.
(3) 4 Bing. N. C. 272.
(4) 11 Ves. at p. 22.

WELFARE *v.* THE LONDON AND BRIGHTON RAILWAY COMPANY.

1869
June 3.

Negligence—Railway Company—Onus probandi.

In an action for negligence against a railway company, the plaintiff proved that he went to their station for the purpose of travelling by their railway, and made some inquiries respecting the departure of trains, and was directed by a porter of the defendants to look at a time table suspended on a wall under a portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof upon the plaintiff and injured him; and at the same time a man was seen on the roof of the portico. The judge nonsuited the plaintiff:—

Held, that there was no evidence that would have justified the jury in finding the defendants were guilty of negligence, and that the nonsuit was right.

DECLARATION, that the defendants were carriers of passengers from London to Croydon on a railway, and used a certain station at London Bridge for the accommodation of their passengers, and the station was then in the possession and under the management of the defendants; and that the plaintiff, in order to become a passenger on the defendants' railway by the defendants' invitation, was about to enter the station by the doorway over which there was a covering, and a wood and iron roof forming part of the station, and in the possession of and used by the defendants, which it was necessary for the plaintiff in order to become such passenger to pass under: nevertheless, by the negligence of the defendants, the covering and wood and iron roof was then in a dangerous condition and unfit for persons to pass under, by reason whereof, and by the negligence of the defendants, a large piece of wood fell through the covering and wood and iron roof upon the plaintiff as he was about to enter the station, and injured him.

Pleas: 1. Not guilty. 2. That the plaintiff was not about to enter into the station by the invitation of the defendants for the purposes mentioned in the declaration. 3. That the covering and wood and ironwork roof did not form part of the station, nor was it in the possession of or used by the defendants.

Issues thereon.

At the trial before Blackburn, J., at the sittings in Middlesex in Michaelmas Term, 1868, the plaintiff proved that he went to the London Bridge station of the defendants for the purpose of going to Croydon, and wishing to ascertain the time of the departure of

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the train, applied for information to one of the company's servants, a porter inside the station. The porter referred the plaintiff to a time bill which was pasted against the wall of the station outside underneath the portico, to which place the plaintiff, under the direction of the porter, went, and while he was looking at the time bill a plank and a roll of zinc suddenly fell down from the top of the portico, and struck the plaintiff on the back of his neck. The plaintiff received severe injuries from the blow. On cross-examination it was elicited that the legs of a man appeared through the hole in the roof from which the plank and zinc had fallen.

The learned judge nonsuited the plaintiff on the ground that there was no evidence of negligence on the part of the defendants.

A rule was obtained for a new trial on the ground that there was evidence of negligence to go to the jury.

Huddleston, Q.C., and *Lopes*, shewed cause. The nonsuit was right. There was no evidence to go to the jury of negligence on the part of the defendants. A mere scintilla of evidence is not sufficient: *Cotton* v. *Wood.* (1) Neither is the mere happening of an accident without more necessarily primâ facie evidence of negligence: *Hammack* v. *White.* (2) Here, beyond the fact that a plank and a roll of zinc fell upon the plaintiff while he was on the defendants' premises, there is no evidence of negligence. The plaintiff was bound to adduce some affirmative evidence of negligence. The cases of *Byrne* v. *Boadle* (3), and *Scott* v. *London Dock Company* (4), are distinguishable. In *Byrne* v. *Boadle* (3), a barrel of flour fell from the upper window of the house of a flour dealer and injured the plaintiff. That was held to be primâ facie evidence of negligence, on the ground that in carrying on his trade the defendant would have to move barrels of flour, and the inference to be drawn from a barrel of flour falling from a window of the warehouse was that a servant of the defendant had been guilty of negligence in moving it. In *Scott* v. *London Dock Company* (4), the majority of the Court, who held that the action would lie for an injury to the plaintiff by bags of sugar falling on him from a crane

(1) 8 C. B. (N.S.) 568; 29 L. J. (C.P.) 333. 7 Jur. N.S. 188.

(2) 11 C. B. (N.S.) 588; 31 L. J. (C.P.) 129. 8 Jur. N.S. 796

(3) 2 H. & C. 722; 33 L. J. (Ex.) 13. 10 Jur. N.S. 1107

(4) 3 H. & C. 596; 34 L. J. (Ex.) 220. 11 Jur. N.S. 264

fixed over a doorway under which he was passing, rested their judgment on the ground that, as the accident was one which did not, in the ordinary course of things, happen in the use of machinery, it afforded reasonable evidence of negligence in the absence of any explanation by the defendants. Here the man would not have been on the roof in the ordinary course of the defendants' business; neither can it be assumed that he was the servant of the company. Primâ facie he would be the servant of the contractor employed to repair the roof.

C. Wood, in support of the rule. The plaintiff made out a case which the defendants were bound to answer. The plaintiff was on the defendants' premises at their invitation, and while there he was injured by a plank and roll of zinc falling on him from the roof of the premises. It is the defendants' duty to keep that roof in a sound condition so that no injury should happen to a person standing under it. The state of the roof, whose servant the man on the roof was, and the cause of the accident, are all matters within the knowledge of the defendants, and can and ought to be explained by them. The plaintiff set up a primâ facie case which the defendants could have rebutted. The observation of Bramwell, B., in *Byrne* v. *Boadle* (1) is particularly applicable to this case. He says, "Look at this case in a reasonable way. The injury is done to the plaintiff, but he has no means of knowing how: the defendant has all those means and does not think fit to tell the jury." *Byrne* v. *Boadle* (2) and *Scott* v. *London Dock Company* (3) were approved of in *Briggs* v. *Oliver.* (4) *Pickard* v. *Smith* (5) is precisely in point. That case is an authority for saying that, even if the man on the roof was the servant of a contractor and not of the defendants, the defendants would nevertheless be liable. If the roof was under repair, it was the duty of the defendants to have cautioned the plaintiff, and if they were negligent in this respect they are responsible. It was their duty to have the station in a proper state of repair, and where a duty is cast on a person to do an act, he cannot relieve himself from liability by employing a contractor: *Gray* v. *Pullen.* (6)

(1) 33 L. J. (Ex.) at p. 15.
(2) 2 H. & C. 722; 33 L. J. (Ex.) 13.
(3) 3 H. & C. 596; 34 L. J. (Ex.) 220.
(4) 35 L. J. (Ex.) 163.
(5) 10 C. B. (N.S.) 470.
(6) 5 B. & S. 970; 34 L. J. (Q.B.) 265.

(2) S C 16 Jur N S 1107
(3) S C 17 Jur N S 204.

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COCKBURN, C.J. I think this rule must be discharged. If the question turned upon whether there had been any negligence on the part of the man carrying the zinc, who, perhaps, may have trodden upon a plank which gave way under him, and which caused the plank and zinc to fall, it would be important to ascertain whether the man was the servant of the company or merely the servant of some contractor whom the company employed; because if the man was not the servant of the company, but of a contractor, the company would not be liable.

If it were necessary to determine that question, we should have to consider whether the case was improperly withdrawn from the jury on the ground that the plaintiff offered no evidence to shew that this person was the servant of the company. I agree that where a thing is being done upon the premises of an individual or a company in the ordinary course of business, it would fairly be presumed that the thing was being done by a person in the employment of the principal for whose benefit the thing was being done; but, in the case of work of this description, it seems to me that that principle would not apply, because it is a matter of universal knowledge and experience that in a great city like this persons do not employ their own servants to do repairs to the roofs of their houses or buildings: they employ a builder whose particular business it is to do it. That being a matter of universal practice, and of universal and common knowledge, I think this is a circumstance which the judge ought to take into account in determining whether there is evidence to go to the jury or not; but I do not think it is necessary to decide this case on this particular point. The only act of negligence that can be suggested, as I understand, is that the company allowed a person to go on this roof when it was in an insecure condition or not sufficiently strong to support his weight, so that the plank gave way under the weight of the man passing across it, and that as a consequence the plank fell down and injured the plaintiff, who was lawfully and by invitation of the company at their station.

In order to make out negligence on the part of the company, and make the company liable for allowing that person to go on the roof, the plaintiff must shew either that the company knew or had the means of knowing, or were bound to take steps to know, the

state in which the roof was. As to that, the case is entirely bare of all evidence. It does not at all follow that because the roof of a building may require repairing, and a workman is directed to go on it to repair it, the person giving the direction knows that the roof is in such a state that if the workman steps upon it, it may give way under him. In a great majority of cases—I may say in all cases, with very few exceptions—where a person desires to have the roof of a building repaired he employs some one, not only to repair the roof, but to see to its condition; and if he employs a competent person, the business of that person upon proceeding to repair the roof is to look at its condition, and to see how far it will support him or his workmen in doing the necessary work. There is nothing in the evidence to shew that the company had, or could have, any knowledge of the insecurity of the roof.

It therefore seems to me (quite irrespective of the question whether this man was the servant of the company, or whether he was in the employ of a contractor), that as regards the subject matter of the negligence charged, there is nothing to shew an absence of reasonable care on the part of the company to ascertain in what state the roof was.

That being the whole foundation upon which the cause of action rests, the rule must be discharged.

MELLOR, J. I am of the same opinion. The maxim respondeat superior does not apply to this case, because I do not see any act of negligence on the part of the man on the roof; and it is consistent with all the facts that the falling of the plank and zinc was a pure accident. It is unnecessary, therefore, to inquire whether the man who, it is assumed, caused the accident was the servant of the company or not. Without repeating the observations made by the Lord Chief Justice, I entirely agree that there was not sufficient evidence to raise a primâ facie case of negligence on the part of the defendants.

LUSH, J. I am of the same opinion. If the action had been brought against the man himself, there would have been no evidence to go to the jury that this accident happened through any negligence of his. All that appears is, that the roof of the

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portico of the company gave way, and, through the aperture so made, a plank and roll of zinc fell and injured the plaintiff, who was underneath; it also appeared that the plaintiff looked up and saw the legs of a man. This was the whole of the evidence, and therefore if this action had been brought against the man himself, I think there would be no evidence to go to the jury that he was guilty of negligence, and that being so, the maxim respondeat superior cannot apply. He is not shewn to have been guilty of negligence, and no one else can be made liable for what was done by him.

Then the only other question is this, is there evidence to shew that the company were guilty of negligence in permitting a person to be on the roof? I think it must be taken that the man was there not as a trespasser, but in some lawful capacity. All that appears is, that the plank gave way; but no evidence was given as to whether the company knew that the plank was unable to bear a man. There was no evidence to justify the jury in finding the company guilty of negligence in permitting the man to be on the roof with the roll of zinc.

BLACKBURN, J. I am entirely of the same opinion. Where a master employs a servant to do a lawful thing, and the servant is guilty of negligence in the course of doing it, the master is responsible. When a contractor undertakes to do a lawful thing, and the contractor over whom the employer has no control, does it by himself or his servants, and is guilty of negligence, the employer is not responsible.

This accident undoubtedly happened from something the man did who was on the roof of the portico with the roll of zinc. If he was the servant of the company, and he had been guilty of negligence, the company would have been responsible. But I greatly doubt whether there was sufficient evidence of negligence on the part of the man to make the defendants liable, assuming him to have been their servant. I quite agree with what my Lord has said with reference to the normal state of things, that people who are employed to repair roofs are independent tradesmen, and not mere servants; and the onus of proving that this man was the servant of the company was on the plaintiff, and he is not to

be presumed to be so; it must be proved, because it is an exceptional case.

Then, with reference to the other point, the nonsuit seems to me to have been right. Mr. Wood argues, that where there is a duty cast upon a person, and that duty is neglected, he is responsible, whether he has employed a contractor to do it for him or not, and he refers to *Picard* v. *Smith*. (1) In this case no duty is cast on the railway company to insure that no plank shall fall. Their duty is to take reasonable care to keep their premises in such a state as that those whom they invite to come there shall not be unduly exposed to danger. No doubt the case might occur where, knowing the state of the premises, the company could not send a man on the roof to repair it without necessarily incurring great danger of the roof falling down, and if the premises are out of repair to this extent, it would be a breach of duty to send a man upon the roof during the hours when persons would be frequenting the premises. But then, in order to make out such a case, something more must be shewn than the mere fact that the accident occurred. In this case there was a total absence of evidence to shew that the premises were really dangerous so as to make the company responsible. There is no evidence that the company were aware that the state of the roof was such as to make it dangerous to send a man on it with zinc. All that was shewn was, that the accident happened, and no proof was given that the company knew they were exposing the persons coming on their premises to undue danger: consequently I am of opinion that the nonsuit was right.

Rule discharged.

Attorney for plaintiff: *H Levy.*

Attorneys for defendants: *Baxter, Rose, Norton, & Co.*

(1) 10 C. B. (N.S.) 470.

1869
June 24.

JOHNSON *v.* SKAFTE.

Bankrupt—Order of Discharge—Unliquidated Damages—Proveable Debt—Bankruptcy Act, 1861 (24 & 25 *Vict. c.* 134), *s.* 153.

The defendant occupied as tenant to P. a warehouse at a yearly rent, and the plaintiff became his sub-tenant of one of the rooms. The defendant's rent being in arrear, P. lawfully distrained the goods in the warehouse, including goods of the plaintiff. To obtain the release of his goods the plaintiff paid P. 15*l.* After this the defendant was adjudged a bankrupt on his own petition, and obtained his order of discharge. The plaintiff then sued the defendant for the damage he had sustained:—

Held, that the defendant was not "liable, by reason of any contract or promise, to a demand in the nature of damages" at the suit of the plaintiff, within the meaning of s. 153 of the Bankruptcy Act, 1861; that the plaintiff's claim was therefore not proveable under the bankruptcy and not barred by the order of discharge.

APPEAL from the County Court of Lancashire holden at Liverpool.

On the trial of this action the jury returned a verdict for the plaintiff for 25*l.*

The particulars of demand were: This action is brought to recover compensation for the injury and loss sustained by the plaintiff in consequence of the defendant wrongfully allowing certain rent, payable by him as the tenant of a warehouse, to be in arrear and unpaid, whereby the goods of the plaintiff, who occupied one of the rooms of the warehouse as tenant to the defendant, were lawfully distrained by the defendant's landlord, and the plaintiff was compelled to pay to the landlord certain moneys in order to obtain the release of his goods, and was put to great inconvenience and was injured in his credit.

The defendant occupied as tenant to one Pemberton (the owner) a warehouse, No. 4, Argyle Street, Liverpool, at a yearly rent. Whilst the defendant was such tenant the plaintiff became his sub-tenant of one of the rooms, into the occupation of which room the plaintiff entered, and placed therein property of considerable value. In the month of February, 1868, whilst the defendant's tenancy and the plaintiff's sub-tenancy continued, the defendant's rent being then in arrear to the amount of 30*l.*, his landlord lawfully distrained the goods in the warehouse, including those of the

plaintiff. To obtain the release of his goods the plaintiff was required by the defendant's landlord to pay, and did pay to him the sum of 15*l.*, and upon that payment being made his goods were restored to him.

After the distress and payment by the plaintiff of this sum of 15*l.*, the defendant became bankrupt on his own petition in the Liverpool Bankruptcy Court, and in due course obtained his order of discharge. The plaintiff has not proved or claimed to prove under the bankruptcy in respect of the subject matter of this action, nor have any steps been taken under s. 153 of the Bankruptcy Act, 1861, to obtain an order of the court of bankruptcy directing an assessment of the damages which the plaintiff sustained by reason of the entry by bailiffs employed by the defendant's landlord upon the room in the warehouse occupied by the plaintiff, and the seizure of his goods therein, nor were such damages assessed until the jury assessed them on the trial of this action.

After the defendant had obtained his order of discharge in bankruptcy the plaintiff commenced this action, in which he claimed as part of his special damage the 15*l.* before referred to.

At the trial, in addition to the defence raised by the defendant on the merits, it was contended on his behalf that the plaintiff's right of action for damages was barred by the order of discharge. The Judge ruled that it was not so barred. (1)

(1) 24 & 25 Vict. c. 134, s. 153:—"If any bankrupt shall, at the time of adjudication be liable, by reason of any contract or promise, to a demand in the nature of damages which have not been and cannot be otherwise liquidated or ascertained, it shall be lawful for the court, acting in prosecution of such bankruptcy, to direct such damages to be assessed by a jury, either before itself or in a court of law, and to give all necessary directions for such purpose; and the amount of damage when assessed shall be proveable as if a debt due at the time of the bankruptcy; provided, that in case all necessary parties agree, the Court shall have power to assess such damages without the intervention of a jury or a reference to a court of law."

s. 161:—"The order of discharge shall, upon taking effect, discharge the bankrupt from all debts, claims, or demands, proveable under his bankruptcy, save as herein otherwise provided, and if thereafter he shall be arrested, or any action shall be brought against him for any such debt, claim, or demand, he shall be discharged upon entering an appearance, and may plead in general that the cause of action accrued before he became bankrupt, and may give this Act and the special matter in evidence; and the order of discharge shall be sufficient evidence of the bankruptcy, and the proceedings precedent to the order of discharge."

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The question for the opinion of the Court was whether this ruling was correct in point of law.

R. G. Williams, for the defendant. The question is, whether the plaintiff's claim is barred by the order of discharge. It is a claim proveable under s. 153, and therefore barred. The action is brought upon an implied contract for quiet enjoyment and to indemnify the tenant against the acts of the superior landlord. The action is founded on an implied promise, and the precedent in Bullen & Leake, p. 154, is framed on a contract of indemnity. *Crampton* v. *Walker* (1) also shews that assumpsit in the proper form of action. Under s. 153, if the demand in the nature of damages be one which cannot otherwise be ascertained, the amount of damages is to be assessed by a jury, and is then proveable under the bankruptcy; if the debt is proveable, it is barred by the order of discharge. It has been held that where a creditor has a claim under s. 153, and does not choose to prove under that section, his claim is barred: *Saunders* v. *Best.* (2) That section provides that the person entitled to the benefit of a contract mentioned in that section may, if he think fit, apply to the Court to set a value upon his interest, and the Court is to ascertain the value, and admit the person to prove the amount. Although the words are permissive, it was yet decided that it was obligatory on the creditor to prove. Section 153 ought to receive the same construction, and it would then be imperative on the plaintiff to proceed under that section; and if he did not, the order of discharge would be a bar to his recovering. *Hoggarth* v. *Taylor* (3), *Sharland* v. *Spence* (4), *Robertson* v. *Goss* (5), decided that claims for unliquidated damages were not proveable under deeds of arrangement. Those cases are therefore distinguishable. *Hoggarth* v. *Taylor* (3) was an action for a wrongful dismissal, and the Court decided that the special terms of the deed did not apply to such a case. In *Sharland* v. *Spence* (4) the action was brought for a breach of contract for not delivering goods, to which a deed of arrangement was pleaded, assigning all the property of the debt to trustees, to be administered as if the

(1) 3 E. & E. 321; 30 L. J. (Q.B.) 19.
(2) 17 C. B. (N.S.) 731.
(3) Law Rep. 2 Ex. 105.
(4) Law Rep. 2 C. P. 456.
(5) Law Rep. 2 Ex. 396.

debtor was adjudged bankrupt. It was contended, on the authority of *Wood* v. *De Mattos* (1), that "creditors" under s. 192 included persons who could prove in bankruptcy; that the plaintiff was a creditor, and his debt was therefore barred, but the Court decided otherwise. No doubt that case goes the length of deciding that even in bankruptcy the debt would not have been barred. But in *Ex parte Wilmot* (2), Lord Chelmsford, C., says that "this section is confined to cases of bankruptcy, and therefore it must be wholly inapplicable to trust deeds, unless extended by other sections of the Act;" and Turner, L.J. (3), says: "As to *Wood* v. *De Mattos* (1), I hardly think that the learned judges who decided that case would have meant their observations to extend to claims for unliquidated damages which were in no way under their consideration. It has not escaped my attention that the conclusion at which I have arrived makes a distinction between trust deeds and bankruptcy, and will leave the debtor liable for unliquidated damages notwithstanding the provisions of s. 153; but I see no reason why this may not be the case, and may not have been intended, as the debtor and creditors might, if he and they were willing, have come to an arrangement with such claimants; and if they were not willing, it is difficult to see why they ought to be bound when they would not have the benefit of the administration of the assets in bankruptcy." It would appear from that case that there is a distinction in applying this section to cases of bankruptcy and deeds of arrangement. *Robertson* v. *Goss* (4) carries the matter no further, for that was decided on the authority of *Sharland* v. *Spence*. (5)

Wheeler, for the plaintiff. A demand proveable under s. 153 so as to be barred by the order of discharge must be a demand arising out of an express contract. Here the action is founded on a breach of duty arising out of the relation of the parties, and is an action of tort: *Tattan* v. *Great Western Railway Company*. (6) Damages resulting from torts are said, in Griffiths and Holmes on Bankruptcy, vol. i. pp. 588, 589, not to be proveable under this section, which extends only to cases of damages upon breaches of

(1) Law Rep. 1 Ex. 91. 12 Jun 1870
(2) Law Rep. 2 Ch. App. at p. 799.
(3) Law Rep. 2 Ch. App. at p. 805.
(4) Law Rep. 2 Ex. 396.
(5) Law Rep. 2 C. P. 456.
(6) 2 E. & E. 844; 29 L. J. (Q.B.) 184. 6 Jun 1860

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contract, leaving damages in cases of tort exactly as they were before the statute. Littledale, J., in *Burnett* v. *Lynch* (1), says: "Where there is an express promise, and a legal obligation results from it, then the plaintiff's cause of action is most accurately described in assumpsit, in which the promise is stated as the gist of the action. But where from a given state of facts the law raises a legal obligation to do a particular act, and there is a breach of that obligation and a consequential damage, there, although assumpsit may be maintainable upon a promise implied by law to do the act, still an action on the case founded on tort is the more proper form of action." The words of the section are "contract or promise," so that "contract" is controlled by the word "promise," and means contracts strictly so called, and not implied promises to indemnify for a breach of duty. Further, the section applies only to admitted breaches of contract. The case here states, that, in addition to the defence raised by the defendant on the merits, it was contended that the plaintiff's right of action for damages was barred. Lord Chelmsford, C., in *Ex parte Wilmot* (2), says: "The section seems to apply only to cases where the bankrupt admits the breach of his contract or promise, but requires the amount of the damages to be proved against him, for it speaks of the assessment of the damages as if the breach of contract or promise was not in question." Neither has there been any assessment of damages, which is a condition precedent to the proof of the demand. *Robertson* v. *Goss* (3), *Hoggarth* v. *Taylor* (4), *Sharland* v. *Spence* (5), are authorities that the creditor is not bound to avail himself of s. 153, and that the order of discharge is no defence to an action for unliquidated damages.

LUSH, J. This case has been very ably argued. At one time I thought it presented great difficulty, and if we had to decide it on some of the grounds which have been argued, I confess I should have found great difficulty in coming to a conclusion one way or the other. But I am of opinion that we ought to decide it in favour of the plaintiff on the ground that the liability of the

(1) 5 B. & C. 589, 609.
(2) Law Rep. 2 Ch. App. at p. 799.
(3) Law Rep. 2 Ex. 396.
(4) Law Rep. 2 Ex. 105.
(5) Law Rep. 2 C. P. 456.

defendant is not a liability contemplated by s. 153 of the Bankruptcy Act, 1861 (24 & 25 Vict. c. 134). Looking at the cases which preceded this enactment, I have no doubt it was intended to apply to express contracts for a breach of which the damages had not been ascertained at the date of the bankruptcy. It applies only to contracts popularly so called. Is this a contract of this description? I am clearly of opinion it is not. It is a claim for damages caused by a distress levied on the plaintiff's goods by the superior landlord for rent which the defendant had omitted to pay. The action is not founded on an express contract of the defendant to pay the rent. It is founded on a liability arising out of the relation of the parties from which the law implies a contract, and the plaintiff can sue in assumpsit for this breach of duty on the part of the defendant. Though for the sake of convenience it is called a contract, it is not one within s. 153, which contemplates only express contracts.

HAYES, J. I am of the same opinion. Section 153 was chiefly passed with reference to mercantile contracts. A good illustration of the law on this point prior to the passing of that enactment is given in a note to Chitty on Contracts, 7th ed. p. 177, note (y): "Formerly damages, which were in their nature unliquidated, and which could be ascertained only by a jury, and had not been ascertained at the time of the bankruptcy, could not be proved under it, although the right to recover them was founded on a contract: *Green* v. *Bicknell.* (1) And therefore where a person who had contracted for a certain quantity of oil to be delivered to him at a future day at a certain price became bankrupt before that day arrived and obtained his certificate, it was held that he was nevertheless liable to an action for not accepting and paying for the oil: *Boorman* v. *Nash.*" (2) That state of the law was supposed to be a great grievance to the bankrupt, and it is now remedied by s. 153. This is a contract of a description totally different to that contemplated by that section. Here the contract is one arising out of the relation of landlord and tenant, and the action is accurately stated in the case to be "brought to recover compensation for the injury and loss sustained by the plaintiff in consequence of the

(1) 8 Ad. & E. 701. (2) 9 B. & C. 145.

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defendant's wrongfully allowing certain rent payable by him as a tenant of a warehouse to be in arrear and unpaid." This is a claim founded on an implied contract, and not within s. 153.

Judgment for the plaintiff.

Attorney for plaintiff: *Chinery.*
Attorneys for defendant: *Underhill & Field.*

July 3.

PLAYFORD *v.* THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY, LIMITED.

Negligence—Telegraph Company—Liability for Mistake in Message—Privity of Contract.

6 L & S
1 C.B.N.S. 677.
2 C.P.D. 65.
67. 4.

The plaintiff, a merchant in London, having a cargo of ice at Grimsby, wrote and requested R. & H. at Hull to make an offer for it by telegraph. R. & H. sent by the defendants' telegraph a message: "We can give you 23*s.* for cargo now at Grimsby;" and paid them for the transmission. By the custom of the ice trade, if an offer by telegraph is accepted, the vendor pays the vendee the cost of the message. The message was misread by the defendants' clerk in London, and was forwarded to the plaintiff—"We can give you 27*s.*," &c. The plaintiff sent the cargo round to Hull; but R. & H. refused to accept the ice except at 23*s.* The plaintiff brought an action against the defendants for the consequent damage:—

Held, that the defendants' liability arose only from contract; that as the message was sent by R. & H. on their own account and not on behalf of the plaintiff, there was no privity between the plaintiff and the defendants, and the fact, that in the event of the plaintiff accepting the offer there was an implied understanding that he would reimburse R. & H. the cost of the message made no difference; and that the plaintiff could not maintain an action against the defendants for their negligence.

CASE stated without pleadings.

1. The plaintiff is a merchant in London and deals in ice. The defendants are an electric telegraph company, limited, incorporated under the Joint Stock Companies Acts, 1856 and 1857, and in the year 1862 they obtained an Act of Parliament, 25 & 26 Vict. c. cxxxi. (local and personal) to enable them to carry on the works and business of an electric telegraph company. (1)

(1) The preamble of the Act, and ss. 4, 61, and 75, were the only parts referred to in the argument: "Whereas under the provisions of the Joint Stock Companies Act, 1856 and 1857, a company has been incorporated called the

2. On the 28th of May, 1866, the plaintiff had a cargo of ice lying on board the schooner *Victor*, at Grimsby, and wrote on that day to Messrs. Rice & Hellyer, ice merchants at Hull, informing them that the *Victor* was at Grimsby with about 100 tons of ice, and requesting from them an offer for the same by telegraph.

3. Accordingly Messrs. Rice & Hellyer went to the defendants

United Kingdom Electric Telegraph Company, Limited, for the purposes as stated in the memorandum of association of the company of making, working, and maintaining telegraphic communication between various places in Great Britain and Ireland, and purchasing and carrying out the systems of one Thomas Allan, in electric telegraphy, and making, working, and maintaining, obtaining, purchasing, selling, disposing, doing, transacting, and performing all things necessary or incident to the carrying out of the aforesaid objects, or any of them, with power to sell or lease to any other company or person, all or any of the telegraphic lines so made, or any of the patents, privileges, easements, or things required, or to grant any licences in respect thereof, or to confer on any other company or person the right to make, work, or maintain any telegraph which the company would be by the now reciting memorandum authorized to make and to acquire and hold any lands or hereditaments, patents, licences, permissions, easements, rights, privileges, or authorities necessary or conducive to the carrying out of the said undertaking and to enter into and carry out any arrangements with any other persons or companies for the connecting the said telegraphic lines of any of them with other telegraphic lines, or for leasing, purchasing, or hiring the said last-mentioned lines, and generally to do all things whatsoever, directly or indirectly incident to the above-mentioned undertakings, or to carrying into effect the purposes of the company, . . . And whereas it would be for the public benefit if such powers were conferred upon the company as will enable them effectually to carry on their undertaking and to perform the duties and services of an electric telegraph company, . . . be it enacted as follows."

s. 4 :—"For the purpose of laying telegraphs, or placing posts, poles, or other apparatus for carrying or supporting a telegraph, the company may by agreement acquire any easement in any lands in any limited right or privilege therein, and all persons by the Lands Clauses Consolidation Act authorized to sell lands may agree with the company for the grant to them of such easement or limited right or privilege."

s. 61 :—"The use of any telegraph and apparatus erected or formed under the provisions of this Act for the purpose of receiving and sending messages, shall, subject to the prior right of use thereof, for the service of her Majesty, and subject to such charges and reasonable regulations as may be from time to time made or entered into by the company, be open for the sending and receiving of messages by all persons alike without favour or preference."

s. 75 :—"The charges to be made by the company from time to time for telegraphic messages sent from one station of the company to any other station of the company, whether in Great Britain or Ireland, shall not exceed the rates specified in the schedule to this Act." [See par 13 of the case.]

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office at the Quayside station at Hull, for the purpose of telegraphing to the plaintiff, and having obtained from the defendants one of their ordinary printed forms for telegrams, filled it up and requested them to send to the plaintiff the message, of which the following only is material: "We can give you 23*s.* for cargo now at Grimsby, small ice the same, cash, thirty tons day."

4. The printed form was directed to the directors of the defendants' company, and was headed, "Gentlemen, I request you to send the following message according to the conditions printed hereon, and I agree to abide by the same."

There was the following memorandum at the foot of the printed form, "All messages taken by this company are received subject to the following conditions."

The conditions were as follows:—

"In order to provide against mistakes and more effectually insure delivery, every message of consequence ought to be repeated by being sent back from the station at which it is to be received to the station from which it is originally sent. Half the usual price for transmission will be charged in addition for repeating the message. The company will not be responsible for mistakes or delays in the transmission of nor for the non-delivery of unrepeated messages from whatever cause arising, either upon its own lines or those of any other company or government which may be employed to forward the message to its destination. Nor will the company be responsible for mistakes or delays in the transmission of nor for the non-delivery of a repeated message to any extent above 5*l.*, unless it be insured at the rate of 1*l.* per cent."

5. When Messrs. Rice & Hellyer had filled up the printed form, they handed it back to the defendants and paid them the sum of 1*s.* 6*d.* for transmitting to the plaintiff by telegraph the message, which was to be forwarded and was forwarded as an uninsured message. No charge was tendered for repeating such message, and it was forwarded as an unrepeated message.

6. As soon as the message was delivered to the defendants, it was despatched by them to their central station at Hull, and was thence forwarded by them to their head office in London, where it was duly received the same day, and where the mistake in respect of which the present action is brought originated.

7. The telegraphic apparatus which was then and is still used by the defendants in their head office in London, was the best telegraphic apparatus then known and was in perfect condition.

8 & 9. The clerk of the defendants, who received the message

misread the dots and strokes denoting 3 for those denoting 7, and she consequently wrote down on the printed form instead of the message actually sent by Messrs. Rice & Hellyer, the following message:—"We can give you 27*s.* for cargo now at Grimsby, small ice the same, cash, thirty tons day."

10. A telegram paper with the last-mentioned message on it was then forwarded by the defendants to the plaintiff.

11. On receipt of the telegram the plaintiff ordered the schooner *Victor* to proceed to Hull with the cargo of ice for Messrs. Rice & Hellyer, but they refused to accept the same except at the price of 23*s.* per ton, and it is admitted that by reason of the error in the telegram the plaintiff sustained damages to the amount of 39*l.* 1*s.* 6*d.*, and that if entitled to recover at all, he is entitled to recover the sum of 39*l.* 1*s.* 6*d.*

12. The clerk had been at the time when she made the mistake in the service of the defendants for about two years. The defendants had used all due care in testing her competency before engaging her as a clerk, and in fact she was in every respect well qualified for the performance of her duties as such clerk.

13. The extreme charge which the defendants could, under s. 75 of 25 & 26 Vict. c. cxxxi., have made for transmitting the telegraphic message from Hull to London, was two shillings.

14. It is the practice amongst ice merchants that, when a merchant who desires to sell a cargo of ice requests from another merchant an offer for such cargo by telegraph, and the offer is accepted, for the merchant accepting such offer to deduct from the price of the cargo sold the cost of the telegram.

15. The plaintiff has not repaid to Messrs. Rice & Hellyer the 1*s.* 6*d.* paid by them to the defendants for the telegram, nor have Messrs. Rice & Hellyer claimed the sum from the plaintiff.

16. The Court was to be at liberty to draw such inferences of fact as a jury might draw.

The question for the opinion of the Court was whether, under the above circumstances, the defendants are liable to the plaintiff for the mistake committed in the transmission of the telegraphic message.

April 10. *Littler*, for the plaintiff. The defendants' company

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is established by statute, and they have certain powers conferred upon them from which they derive great benefit. This is clear from the preamble of their Act, and also from ss. 4, 61 & 75. They have consequently certain duties imposed upon them, and they are liable for a breach of those duties. There is no case decided in England which defines those duties, but there are several cases in the American courts. The duties of a telegraph company are laid down in Scott and Jarnagin's Treatise upon the Law of Telegraphs, s. 95, as follows: "They receive written messages at one place, and undertake to deliver the same words or symbols to the party addressed at another place. This is a bailment . . . In considering the nature of this engagement, it is proper to leave out of view the appliances used in its performance. The message is to be delivered with literal accuracy. Nothing is to be changed . . . The company is not even bound to accept a message written in any other than the national or statutory alphabet, although they have no right to require that it should be written in the national or statutory language. The employer may combine letters as he wishes, and the company is not at liberty to translate, change the collocation, or correct the orthography. The engagement, then, is to receive, transmit, and deliver according to directions, a prescribed form of letters and words commonly called a message."

[COCKBURN, C.J. That is very subtle and refined reasoning. I cannot say I can go along with it. There can hardly be said to be a bailment.]

The message, as near as can be, is to be delivered as sent.

[COCKBURN, C.J. It is not the same message; the company do not even transmit it in the same letters; it is done by signs and figures.]

There is a contract, and it is the duty of the defendants to enter into this contract to carry a message, just as a railway company enters into a contract to carry a passenger.

[LUSH, J. The first step to be established is, that there is a contract between the defendants and the plaintiff.]

De Rutte v. *New York, Albany, and Buffalo Telegraph Company* (1), is directly in point. The Court there says: "It does not necessarily follow that the contract is made with the person by

(1) 1 Daly New York Rep. 547.

whom or in whose name a message is sent. He may have no interest in the subject-matter of the message, but the party to whom it is addressed may be the only one interested in its correct and diligent transmission; and when this is the case he is the one, in reality, with whom the contract is made." In that case Theophilus de Rutte sent a message to Edward De Rutte, "Buy for C. & L. a shipload five to six hundred tons white wheat, limit 22 francs." The company changed 22 to 25 francs. Edward De Rutte sued for the loss occasioned by the mistake. The company set up as a defence that the contract was with Theophilus, who sent the message acting as agent of C. & L. But the Court held the plaintiff entitled to recover. In *New York and Washington Printing Telegraph Company* v. *Dryburg* (1) the same law is laid down. The principle which governed that case is, that the telegraph company had a duty to perform to the person to whom the message was addressed, and if they negligently performed that duty they were liable as wrongdoers. *Western Union Telegraph Company* v. *Carew* (2) is also in favour of the plaintiff. The message, when it is delivered to the telegraph company, becomes the property of the person to whom it is sent. In *MacAndrew* v. *Electric Telegraph Company* (3) the sender of the message was the plaintiff, and therefore it has no application to the present case. [He also argued that the conditions were unreasonable; but the argument is omitted, as the Court gave no judgment on this point.]

Pollock, Q.C. (*A. L. Smith* with him), for the defendants. In order to succeed in this action the plaintiff must establish that the senders of the message were his agents, otherwise there is no privity between the plaintiff and the defendants, and the action cannot be maintained. It is contrary to every principle of law that in this case there can be an agency between the plaintiff and Messrs. Rice & Hillyer. Their interests are opposed; the message is merely a reply to the plaintiff's letter; and, further, it was optional with them whether they would reply by telegraph. There was, therefore, no agency. This case is like the case of goods sent by a carrier of the consignor; in which case the property does not

(1) 35 Pennsylvania Rep. 298. (2) 15 Michigan Rep. 525.
(3) 17 C. B. 3; 25 L. J. (C.P.) 26.

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pass to the consignee, and he cannot sue the carrier: *Swain* v. *Shepherd* (1); *Coats* v *Chaplin*. (2) There is no analogy between the duty of telegraph companies and common carriers towards the public; the liability of common carriers to the public is founded on the custom of the realm; and they are insurers as to goods only, but not as to passengers: *Readhead* v. *Midland Railway Company*. (3) In *Breese* v. *United States Telegraph Company* (4) it was decided that telegraph companies are not common carriers. The American cases which have been cited put the liability of telegraph companies to third parties for errors in the delivery of a message on the ground of a duty to the public imposed by the statute on such companies; but the plaintiff can only maintain the action on the ground of a breach of duty arising out of a contract, and he is no party to the contract, and therefore cannot sue. [He also argued that the conditions were reasonable, and cited on this point: *M'Cance* v. *London and North Western Railway Company* (5); *Harrison* v. *London, Brighton, and South Coast Railway Company* (6); *White* v. *Great Western Railway Company* (7); *MacAndrew* v. *Electric Telegraph Company* (8); *Izett* v. *Mountain* (9); *Nicholson* v. *Willan* (10); *Robinson* v. *Great Western Railway Company*. (11)]

Cur. adv. vult.

July 3. The judgment of the Court (Cockburn, C.J., Lush, Hannen, and Hayes, JJ.) was delivered by

LUSH, J. The plaintiff, having a cargo of ice on board a schooner of his at Grimsby, invited an offer for it from Messrs. Rice & Hellyer, merchants at Hull, and requested them to make such offer by telegraph. Accordingly, Messrs. Rice & Hellyer sent to the office of the defendants' company, at Hull, a message for transmission to the plaintiff, by which they offered to take the ice at 23*s*. per ton. In the reading off of the message at the defend-

(1) 1 Mood. & Rob. 223.
(2) 3 Q. B. 483.
(3) Ante, p. 379.
(4) 45 Barbour New York Rep. 274.
(5) 7 H. & N. 477; 31 L. J. (Ex.) 65.
(6) 2 B. & S. 122; 31 L. J. (Q.B.) 113.
(7) 2 C. B. (N.S.) 7; 26 L. J. (C.P.) 158.
(8) 17 C. B. 3; 25 L. J. (C.P.) 26.
(9) 4 East, 371.
(10) 5 East, 507.
(11) 19 C. B. (N.S.) 51; 35 L. J. (C.P.) 123.

ants' office in London a mistake was made in the figures, and the telegram sent to the plaintiff represented the offer to be 27*s.*, instead of 23*s.*, per ton. The plaintiff thereupon, in acceptance of the supposed offer, ordered the schooner to proceed to Hull with the ice and, upon her arrival there, the mistake was discovered. Messrs. Rice & Hellyer refused to receive the cargo except at 23*s.* per ton; and this action was brought by the plaintiff to recover the damage he had sustained by reason of the mistake, and which amounted to 39*l.* 1*s.* 6*d.* It was stated, as a fact in the case, that where an offer made, upon the invitation of the seller, by telegraph is accepted, the cost of the telegram is allowed to the buyer on account. On delivery of the message for transmission Messrs. Rice & Hellyer signed the ordinary printed form by which the defendants stipulated that "they would not be responsible for mistakes or delays in the transmission of, nor for the non-delivery of unrepeated messages from whatever cause arising, and that half the usual price for transmission would be charged in addition for repeating the message."

By statute 25 & 26 Vict. c. cxxxi. (private Act) certain powers for laying down the line were conferred on the defendants, and by s. 61 it was enacted "that the use of any telegraph and apparatus erected and formed under the provisions of this Act for the purpose of receiving and sending messages, should, subject to the prior right of use thereof for the service of her Majesty, and subject to such charges and reasonable regulations as might from time to time be made and entered into by the company, be open for the sending and receiving of messages by all persons alike without favour or preference." And s. 75 limited the charges to be made by the company to the rates specified in the schedule. It appeared that if the message had been repeated, the charge for such repeated message, according to the company's price and scale, paid by Messrs. Rice & Hellyer would have exceeded the traffic rate.

It was contended on behalf of the plaintiff; first, that the defendants were liable, either as upon a contract with him made through Messrs. Rice & Hellyer as his agents, or for the breach of a duty to take due care of a message which, it was argued, became his property as soon as it was delivered to the defendants; and, secondly, that the stipulation that they would not be responsible

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for any mistakes, however caused, unless a charge was paid which exceeded the maximum allowed by the Act, was an unreasonable regulation within the meaning of s. 61, and therefore void.

As we are against the plaintiff on the first point, it is unnecessary to give any opinion upon the second. The obligation of the company to use due care and skill in the transmission of the message is one arising entirely out of the contract. There is nothing in their special Act which affects their relation either to the sender or the sendee of a message, or makes it different from what it would have been had no act of parliament been passed. We cannot agree with the judgments given in the American courts in the cases cited in the argument, that there is any analogy between a consignment of goods through a carrier and the transmission of a telegram. We cannot see how the person to whom a telegraphic message is sent can be said to have a property in the message, any more than he could have had if it had been sent orally by the servant of the sender.

The only question therefore is, with whom was the contract made? And to this there can be but one answer. It was made with Messrs. Rice & Hellyer. The offer was sent by them on their own behalf and in their own interest. In so doing they acted, it is true, on the invitation of the plaintiff, but not as his agents or as representing him; and the circumstance that there was an implied understanding between them that, in the event of his accepting their offer, he should reimburse them the expense of making it, in no way alters the relation between the two parties, which was that of seller and buyers, and not that of principal and agents. It follows that the plaintiff, who is a stranger to the contract with the company, cannot maintain an action against them for the breach of it.

Our judgment is, therefore, for the defendants.

Judgment for the defendants.

Attorney for plaintiff: *Morley.*
Attorneys for defendants: *Crosley & Burn.*

IN THE MATTER OF THE COPYRIGHT ACTS, 5 & 6 VICT. c. 45; 25 & 26 VICT. c. 68.

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June 12.

GRAVES' CASE.

Copyright in Works of the Fine Arts—Expunging Entry of Memorandum of Copyright—"Person deeming himself aggrieved"—Entry of Memorandum of Copyright and subsequent Assignments—Copyright in Photograph—5 & 6 Vict. c. 45, ss. 1 & 4; 25 & 26 Vict. c. 68, s. 1.

By 25 & 26 Vict. c. 68, s. 1, "the author of every original painting, drawing, and photograph, and his assigns," shall have the exclusive copyright for the life of the author, and seven years after his death; by s. 4, a register of proprietors of copyright is to be kept, "wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright," with certain particulars, "and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration":—

Held, that a person to whom the copyright in a picture has been assigned by the author, of which assignment a memorandum has been duly registered, has a good title under the Act, although the original copyright of the author has not been registered.

Held, also, that the Act gave a copyright in a photograph of an engraving from a picture.

By 5 & 6 Vict. c. 45, s. 14, and 25 & 26 Vict. c. 68, s. 5, "if any person shall deem himself aggrieved" by any entry in the register, he may apply to one of the superior Courts for an order that such entry may be expunged or varied.

W. being charged under the Acts, on the complaint of G., with the infringement of G.'s copyright in a picture, a certified copy of the entry in the register of the assignment to G. was given in evidence, under the Acts, to prove G.'s title. W. having been convicted, applied to the Court to expunge the entry, on the ground that G. had not a good title to the copyright; W. did not set up any title in himself:—

Held, that W. was not "a person aggrieved" within the meaning of the statutes.

RULE, calling on Henry Graves to shew cause why the registering officer appointed by the Stationers' Company, for the purposes of the Act, 5 & 6 Vict. c. 45, should not expunge certain entries on the register of proprietors of copyright in paintings, drawings, and photographs, to wit, an entry bearing date the 2nd of August, 1868, of an oil painting, "A Piper and a Pair of Nutcrackers;" whereof the date of agreement and assignment is entered as of the 29th of July, 1865; names of the parties to the agreement, Louis Victor Flatow, Henry Graves; name and place of abode of proprietor of copyright, Henry Graves, 6, Pall Mall; name and place

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of abode of author of work, Sir E. Landseer, No. 1, St. John's Wood Road: also two entries, each bearing date the 4th of September, 1866, of "My First Sermon," and of "My Second Sermon," respectively; assignment the 18th of August, 1866; names of parties to agreement, Moore, McQueen, & Co., Limited, Henry Graves & Co.; name and place of abode of author of work, John Everett Millais, of Cromwell Place, South Kensington: also two entries dated the 5th of January, 1866, of copyright in two several photographs entitled, respectively, "Waiting for the Verdict," and "The Acquittal," and an entry dated the 26th of February, 1866, of a photograph, "Finding the Text," of the copyright whereof Henry Graves, of 6, Pall Mall, is entered as the proprietor.

The rule was obtained on behalf of one J. B. Walker; and it appeared from the affidavits that Walker was arrested on a magistrate's warrant, granted on an information and complaint of one Burgess, in the employ of Graves, charging, that Walker, not being the proprietor of copyright in certain paintings, or the designs thereof, called respectively "My First Sermon," "My Second Sermon," and "A Piper and a Pair of Nutcrackers," and in certain photographs called, respectively, "Waiting for the Verdict," "The Acquittal," and "Finding the Text," unlawfully did sell divers copies thereof, knowing the same to have been unlawfully made.

At the hearing of the complaint against Walker, certified copies of the several entries in the register of proprietors of copyright in paintings, drawings, and photographs, of the pictures and photographs mentioned in the rule, were produced by Graves as evidence of his property therein. As to "My First Sermon," and "My Second Sermon," Graves had purchased the copyright in the two pictures from Moore, McQueen, & Co. Limited, whose business, previously to the sale, was under the management of trustees appointed by the Court of Chancery to wind it up; and the assignment was sealed with the seal of Moore, McQueen, & Co., and signed by the committee of management; the paintings were painted by Mr. Millais, who sold them and the copyrights to Agnew & Folds, who sold them with the copyrights to Moore, McQueen, & Co., Limited. The names of the trustees of Moore, McQueen, & Co., Limited, did not appear in the registry of the assignment to Graves, nor was there any memorandum of the assignment to Moore,

McQueen, & Co., Limited, by the persons previously entitled to the copyright of these pictures.

With regard to the painting, "A Piper and a Pair of Nut-crackers," Graves had bought the copyright of the painting from Flatow, but no memorandum of the assignment by the painter, Sir E. Landseer, had been registered.

The three photographs were executed for Graves, under an agreement, by one A. Spencer, and the copyright in them was, by the agreement, reserved to Graves. These photographs were taken from three engravings made for Graves, the copyright of which belonged exclusively to him, and they were the first and only photographs of these subjects.

Walker did not shew by evidence that he had ever purchased, or in any way become interested in, the copyright of any of the paintings or photographs.

The magistrate held the certified copies to be primâ facie evidence of the proprietorship of Graves in the copyright, and the charges having been proved, except as to "My First Sermon," he convicted Walker in twelve separate offences in penalties of 10*l.* for each offence.

H. S. Giffard, Q.C., and *Poland*, shewed cause. This application is made under s. 14 of 5 & 6 Vict. c. 45, and s. 5 of 25 & 26 Vict. c. 68. (1) The question is, whether the applicant is a party

(1) 5 & 6 Vict. c. 45, s. 14:—"If any person shall deem himself aggrieved by any entry made under colour of this Act in the said book of registry, it shall be lawful for such person to apply by motion to the Court of Queen's Bench, Court of Common Pleas, or Court of Exchequer, in term time, or to apply by summons to any judge of either of such courts in vacation, for an order that such entry may be expunged or varied; and that upon any such application by motion or summons to either of the said courts or to a judge as aforesaid, such court or judge shall make such order for expunging, varying, or confirming such entry, either with or without costs, as to such court or judge shall seem just; and the officer appointed by the Stationers' Company for the purposes of this Act shall, on the production to him of any such order for expunging or varying any such entry, expunge or vary the same, according to the requisitions of such order."

25 & 26 Vict. c. 68, s. 1:—"The author, being a British subject or resident within the dominions of the Crown, of every original painting, drawing, and photograph, which shall be or shall have been made either in the British dominions or elsewhere, and which shall not have been sold or disposed of before the commencement of this Act, and his assigns, shall have the sole and exclusive right of copying, engraving, reproduc-

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aggrieved within the meaning of s. 14. If he is not

ing, and multiplying such painting or drawing, and the design thereof, or such photograph, and the negative thereof, by any means and of any size, for the term of the natural life of such author, and seven years after his death. . . ."

s. 4:—"There shall be kept at the hall of the Stationers' Company, by the officer appointed by the said company, for the purposes of the Act, 5 & 6 Vict. c. 45, intituled 'An Act to Amend the Law of Copyright,' a book or books entitled 'The Register of Proprietors of Copyright in Paintings, Drawings, and Photographs,' wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright; and such memorandum shall contain a statement of the date of such agreement or assignment, and of the names of the parties thereto, and of the name and place of abode of the person in whom such copyright shall be vested by virtue thereof, and of the name and place of abode of the author of the work in which there shall be such copyright, together with a short description of the nature and subject of such work, and in addition thereto, if the person registering shall so desire, a sketch, outline, or photograph of the said work; and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration, and no action shall be sustainable, nor any penalty be recoverable, in respect of anything done before registration."

s. 5:—"The several enactments in the said Act, 5 & 6 Vict. c. 45, contained, with relation to keeping the register book thereby required, and the inspection thereof, the searches therein, and the delivery of certified and stamped copies thereof, the reception of such copies in evidence, the making of false entries in the said book, and the production in evidence of papers falsely purporting to be copies of entries in the said book, the application to the courts and judges by persons aggrieved by entries in the said book, and the expunging and varying such entries, shall apply to the book or books to be kept by virtue of this Act, and to the entries and assignments of copyright and proprietorship therein under this Act, in such and the same manner as if such enactments were here expressly enacted in relation thereto, save and except that the forms of entry prescribed by the said Act, 5 & 6 Vict. c. 45, may be varied to meet the circumstances of the case, and that the sum to be demanded by the officer of the said Company of Stationers for making any entry required by this Act shall be 1s. only."

s. 6:—"If the author of any painting, drawing, or photograph, in which there shall be subsisting copyright, after having sold or disposed of such copyright, or if any other person, not being the proprietor for the time being of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, hire, exhibition, or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, hire, exhibition, or distribution, any such work or the design thereof, or, knowing that any such repetition, copy, or other imitation, has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, let to hire, exhibit, or distribute, or offer for sale, hire, exhibition, or distribution, or cause or procure to be imported, sold, published, let to hire, distributed, or offered for sale,

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entitled to have these entries expunged. *Chappell* v. *Purday* (1) will be cited by the other side. That case really shews that the Court will not expunge an entry unless it be clear that the plaintiff has no right to use it at the trial. The facts in that case shewed that there was an existing controversy at the time the Act passed, and at the time the entry was made. Here it is admitted that Walker is not interested in the copyright of any of the works. The fair meaning of the judgment in *Chappell* v. *Purday* (1) is, that the applicant must not be a mere stranger; and if it be shewn, by the facts, that a bonâ fide dispute exists as to title, and the entry is calculated to prejudice the applicant's title, the Court will interfere for his protection. According to *Ex parte Davidson* (2), the Court will not interfere to expunge an entry unless there is distinct evidence that it is false. In the present case the applicant has not attempted to shew that he has any title whatever in the copyrights, and is only aggrieved because the entry was adduced in evidence against him. The entry was only primâ facie evidence, and could have been rebutted. The other grounds on which it is sought to expunge the entry are untenable. It is not necessary that the author of a work of art should register under s. 4 of 25 & 26 Vict. c. 68, to entitle him to copyright. Section 1 of that Act creates an absolute copyright in the author; s. 3 makes the copyright personal property and assignable; s. 4 is not a proviso on s. 1, but an independent enactment, which requires a memorandum of the copyright to be registered before the proprietor can bring any action, or take any benefit under that statute. It is, therefore, not necessary that the proprietors of the works, or their assignees prior to Graves, should have registered. The description of the painting, "A Piper and a Pair of Nutcrackers," is sufficient; it is a well known painting by

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hire, exhibition, or distribution, any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person, for every such offence, shall forfeit to the proprietor of the copyright for the time being a sum not exceeding 10*l.*; and all such repetitions, copies, and imitations made without such consent as aforesaid, and all negatives of photographs made for the purpose of obtaining such copies, shall be forfeited to the proprietor of the copyright."

(1) 12 M. & W. 303.

(2) 18 C. B. 297; 25 L. J. (C.P.) 237.

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an eminent painter. It is also objected that there is no copyright in photographs taken from engravings of paintings, but a photograph from an engraving of a picture is an original photograph.

Underdown, in support of the rule. Copyright in any work of art is a monopoly: *Thompson* v. *Symonds* (1); and the person who claims a monopoly must strictly comply with all the conditions which the statute creating the monopoly imposes: *Newton* v. *Cowie*. (2) Section 4 of 25 & 26 Vict. c. 68, requires a memorandum of every copyright and every subsequent assignment of such copyright to be registered, and unless these conditions are strictly complied with there can be no copyright. The painter of the paintings in question has not registered his title, neither have the assignments prior to Graves been registered; he has, therefore, no copyright. The entry with respect to the two paintings, "My First Sermon," and "My Second Sermon," are invalid, because the names of the parties required to be inserted in the memorandum are not correctly set out. The names of the trustees of Moore, McQueen, & Co., Limited, are omitted. The entry is not according to the Act, and the defendant is not a proprietor: *Low* v. *Routledge*. (3) If the entry is wrongly made, it ought to be expunged: *Ex parte Bastow*. (4) *Chappell* v. *Purday* (5) is an express authority that the applicant is a party aggrieved. The description of the painting, "A Piper and a Pair of Nutcrackers," is not sufficient. No one could infer, from such a description, that a picture representing a bullfinch and a pair of squirrels was meant: *Ex parte Beal*. (6) Lastly, there is no copyright in the photographs which are taken from the engraving of a picture. The words of s. 1 are "the author . . . of every original painting, drawing, and photograph." These photographs are not original photographs, as they have been taken from a work of art. They are mere copies of the engraving, and not original in the sense intended by the first section.

BLACKBURN, J. I am of opinion that the rule should be discharged. The rule is to expunge certain entries on the register

(1) 5 T. R. 41.
(2) 4 Bing. 234.
(3) 33 L. J. (Ch.) 717.
(4) 14 C. B. 631.
(5) 12 M. & W. 303.
(6) Law Rep. 3 Q. B. at p. 393.

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of proprietors of copyright. The entry on the register is primâ facie evidence of the title of the person whose name appears on the register as proprietor. And although the evidence is liable to be rebutted, it enables him the more easily to prove his title, and to throw upon any person impeaching it the burden of shewing that he has no title. Section 14 of 5 & 6 Vict. c. 45, gives a remedy, by application to one of the superior courts, to any person who "shall deem himself aggrieved" by any entry in the register. These words shew that the legislature intended to limit the class of persons who were empowered to apply; and the applicant must lay before the Court facts showing that he is really a person aggrieved.

Now the first question is, is the present applicant a person aggrieved within the meaning of s. 14? Upon this it is to be observed that Mr. Graves had caused the entries to be made as primâ facie evidence that he has a monopoly in multiplying copies of certain pictures and photographs, the right to multiply which, but for the entry, would belong to the public. Accordingly, in one sense, any person may deem himself aggrieved by the entry, because it gives a facility for enforcing against him an interference with what may be called the right at common law to multiply copies of these paintings. But although in this sense the applicant may be a person aggrieved, yet, if it were necessary to decide this question, which I shall presently point out it is not, I should be of opinion that the legislature did not mean to allow any person who thought fit to find as many flaws as he liked in a title to a copyright, and to apply to expunge an entry, unless the registered proprietor can prove with precision everything relating to his title. It seems that, to make a person aggrieved within the meaning of the statute, the applicant must have some substantial objection, and one going to the merits of the registered proprietor's title; then the Court may direct an issue, or have the question otherwise disposed of, or, if they think this the proper course, may set aside or expunge the entry. But I do not think it is enough to entitle a person to say that he is aggrieved, and that the entry ought to be expunged, that, although the registered proprietor has a complete title in equity and in good sense, yet there is some slip either in the signing of the memorandum or in the spelling of a name. This would be my view, if it were neces-

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sary to decide this question; and perhaps I ought to guard myself by saying that it is not necessary to decide this question in this case.

The chief question appears to arise on 25 & 26 Vict. c. 68. Section 1 creates the copyright in the author and his assigns for the term of his natural life, and seven years after his death. The latter part of s. 2 meets the objection, that although a person may have acquired the right to multiply photographic copies of any object, that shall not prevent another person from taking a fresh photograph of the same object. Without this provision the Act would probably have received the same interpretation, but its insertion saves any difficulty. From s. 3 it appears plain that the painter has the copyright in the original picture; and if he executes a memorandum in writing assigning it to another person, the copyright is vested in the assignee. This has been done in the present case, and as soon as the memorandum was signed Mr. Graves became the proprietor of the copyright. Section 4 imposes the necessity for registration of the copyright, and the subsequent assignments. Prior to registration Mr. Graves could not have sued. But he did register his title without mentioning the assignments to him. The reason why it is necessary to register the subsequent assignments is obvious: it is, that any one may trace out the proprietorship; but the objection has been taken that all prior assignments also must be registered. The statute does not contain any such provision in express terms, nor can it be implied from the language of any of the sections. No reason can be suggested why Mr. Millais, after he has ceased to be the proprietor, should cause such an entry to be made as the statute requires to be made by the proprietor. Great injustice might be caused: as it is possible that an artist might assign his copyright before he had time to get it registered, and that copyright would be lost because it had not been registered by him. This interpretation of the statute requires the introduction of words which are not to be found there.

Low v. *Routledge* (1), before Kindersley, V.C., was decided on a different statute (5 & 6 Vict. c. 45, s. 13), and has no application to this case. In that statute it is said that the registered proprietor of a book may transfer the copyright therein by an entry on the

(1) 33 L. J. (Ch.) 717.

register. That is a provision different from the one which we are now considering, and the decision of the Vice-Chancellor does not appear to me to be material to the present case. I think Mr. Graves' title good, and that the entry of his proprietorship ought not to be expunged.

I wish to repeat that in my opinion the applicant is not a person aggrieved within the meaning of the statute; but that it is not necessary to decide this question, as I think Mr. Graves' title good

An objection has been made as to the registration of the photographs, on the ground that they are photographs of pictures, and therefore are not within the words of the Act, which applies only to "every original painting, drawing, or photograph." It has been argued that the word "original" is to be taken as applying to the word photograph. The distinction between an original painting and its copy is well understood, but it is difficult to say what can be meant by an original photograph. All photographs are copies of some object, such as a painting or a statue. And it seems to me that a photograph taken from a picture is an original photograph, in so far that to copy it is an infringement of this statute. As I have already pointed out, by s. 2, although it is unlawful to copy a photograph or the negative, it is permitted to copy the subject matter of the photograph by taking another photograph.

It was argued that the description of one picture was insufficiently entered; it was registered as "A Piper and a Pair of Nutcrackers," when it represented a bullfinch and two squirrels. This was said to be a bad description. If the applicant is in any way aggrieved by this description of the picture, the question may hereafter be raised in a proper manner.

MELLOR, J. I am of the same opinion. I wish to say a few words on one point, and that is as to the effect of registration. The statute, for the first time, allows a copyright of every original painting, drawing, and photograph, in the author or his assignee. The statute contemplates the vesting of the copyright either in the author or in the person who owns the original painting, drawing, or photograph, provided the proper precautions to secure it have been taken; and in s. 3 a proprietor is introduced who is not the author but the assignee, and he must be the assignee by

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virtue of some assignment in writing. Section 4 uses the word proprietor, and on looking back to the preceding sections no doubt can be felt that the word proprietor means the person who has got the property by assignment, as well as the author. If a proprietor, whether author or assignee, wants to take advantage of the Act he must register, because, unless he registers, he cannot avail himself of its provisions.

HANNEN, J. I am entirely of the same opinion. I would add only a few words on the point as to who is a person aggrieved. This application was originally made to the Court on the ground that the applicant was to be considered to be a person aggrieved, because he had been convicted by means of evidence afforded by this entry. It seems to me that that contention is wholly untenable. The applicant was not aggrieved by the entry in the sense intended, because he might have adduced evidence to contradict the entry. He was convicted upon legal evidence, and it was the applicant's own fault that he did not rebut the primâ facie evidence which the entry afforded. He is therefore in no different and no better position than any other of the Queen's subjects. He now renews the application upon grounds which, if good at all, would be open to all the world. Anybody might come to the Court and say, "Here is an entry which is false, and I am therefore aggrieved by it." A person to be aggrieved within the meaning of the statute must shew that the entry is inconsistent with some right that he sets up in himself or in some other person, or that the entry would really interfere with some intended action on the part of the person making the application. For instance, if a person brought to the notice of the Court that he had a right to take copies of certain pictures, but that he was afraid to do so while the entry existed, the Court might entertain his application if they thought it made bonâ fide. But when we see, as in the present case, that the application is made to raise a technical question, which the applicant is just as well able to raise by means of specific evidence, for the purpose of rebutting the primâ facie title in Mr. Graves, I think we ought not on such a ground to grant the application.

On the other points I have nothing to add. I agree with the construction which has been put on the statute. I think that the

original proprietor, if he does not register, is subject only to this disadvantage, that he cannot until he has done so become entitled to the benefit of the statute. But he is capable of transferring his copyright as he can transfer any other property. For these reasons I concur in the judgments which have been given.

Rule discharged.

Attorney for Walker: *Chipperfield.*
Attorneys for Graves: *Lewis & Lewis.*

HARDY *v.* FETHERSTONHAUGH.

June 11.

Inclosure Acts—Costs of Trial of an Issue under 8 *&* 9 *Vict. c.* 118, *s.* 56—"*Costs to abide the event of the Trial.*"

The defendant had rights of pasture awarded to him by the valuer, under 8 & 9 Vict. c. 118, in respect of 198 acres of land, and this award was confirmed by the assistant commissioner. The plaintiff appealed against this decision, under s. 56, and brought an action on an issue, in which the plaintiff affirmed and the defendant denied that the decision of the commissioner was erroneous so far as it confirmed the allowance of the claims of the defendant to rights of pasture in respect of the 198 acres. At the trial of the issue, the plaintiff called witnesses to disprove that the defendant had rights of common in respect of any of the 198 acres; and the defendant gave evidence that he was entitled to rights of common in respect of the whole of the 198 acres. A verdict was returned for the plaintiff in respect of part of the 198 acres, and for the defendant in respect of the residue; the value of the rights thus disallowed and allowed being about equal.

By 8 & 9 Vict. 118, s. 56, after verdict and final judgment, "the commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined according to the event of such trial; and the costs attending such trial shall abide the event of the trial:"—

Held, that "event of the trial" did not mean "event" as if it were an ordinary action; and that the plaintiff was not entitled to the general costs of the cause, but each party was entitled to the costs of that part of the issue on which he had succeeded.

RULE, calling on the plaintiff to shew cause why the Master should not review his taxation.

The action was on a feigned issue, under the Inclosure Act, 8 & 9 Vict. c. 118, s. 56. (1)

(1) 8 & 9 Vict. c. 118, s. 56:—"If any person claiming to be interested in any land proposed to be inclosed under this Act shall be dissatisfied with any determination of the commissioners or assistant commissioner concerning any

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The issue recited that, under the Inclosure Acts, the valuer acting for the inclosure of certain moors in the township of Kirkswald, in the county of Cumberland, had, inter alia, determined that the claim of Timothy Fetherstonhaugh to rights of common of pasture over the said moors in respect of a mansion house, pleasure grounds, and several closes in his own occupation, containing 198 acres, in respect of the dwelling house and several closes of land occupied by Henry Williamston, containing forty-eight acres, and in respect of several cottages and gardens occupied by Robert Garnett and others, containing two acres, should be allowed over certain of the moors, and disallowed over others; that the assistant commissioner confirmed the valuer's decision; that Christopher Hardy claims to be and is interested in certain of the moors, and is dissatisfied with the decision of the commissioner in respect of the said claim of Fetherstonhaugh in so far as it confirmed the allowance of the claim of Fetherstonhaugh; that due notice had been given under s. 56 of 8 & 9 Vict. c. 118; and that all conditions, &c., had happened to entitle Hardy to bring an action on a feigned issue against Fetherstonhaugh. "Now the said Hardy affirms and the said Fetherstonhaugh denies that the

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claim or interest in or to the land proposed to be inclosed under the powers hereinbefore contained, and shall cause notice in writing of such dissatisfaction to be delivered to the commissioners within thirty days next after notice of such determination shall have been given to the several parties or persons specially interested, if any such there be, it shall be lawful for such person, so dissatisfied, and giving such notice as aforesaid, to bring an action upon a feigned issue against the person in whose favour such determination shall have been made, or against the commissioners, and to proceed to trial at law at the then next assizes, or the assizes immediately following such next assizes, to be holden for the county wherein the land relating to which such dispute shall arise shall be situate; and the defendant in such action shall, upon being served with the usual process therein, appear thereto, and accept one or more issue or issues, whereby such claim and the right and interest thereby insisted upon may be tried and determined, such issue to be settled by the proper officer of the court in which the said action shall be commenced, in case the parties shall differ about the same; and the verdict given upon the trial of such action shall be binding and conclusive upon all parties thereto, unless the court wherein such action shall be brought shall set aside such verdict and order a new trial to be had; and after such verdict shall be given, and final judgment obtained thereon, the commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined according to the event of such trial; and the costs attending any such action shall abide the event of the trial."

decision of the said assistant commissioner is erroneous, in so far as such decision allows or confirms the allowance of the claims of Fetherstonhaugh to rights of common of pasture over the said moors in respect of the mansion and lands containing 198 acres."

At the trial the plaintiff denied, and called witnesses to disprove, that the defendant had rights of pasture in respect of any of the 198 acres, and the plaintiff claimed and produced evidence in support of the right in respect of the whole of the 198 acres.

A verdict was ultimately entered for the plaintiff as to so much of the 198 acres as lies on the south side of Raven Beck, and is in the parish of Kirkswald, and for the defendant as to the residue of the 198 acres.

The value of the rights found for the plaintiff and for the defendant was very nearly equal, and the acreage also nearly equal.

On taxation, the Master allowed the plaintiff the general costs of the cause, 266*l.* 19*s.*, and taxed the defendant the costs which related solely to that part of the issue found for him at 12*l.* 1*s.*

Gray, Q.C., shewed cause. By 8 & 9 Vict. c. 118, s. 56, the costs of the issue are to abide the event. Here the event was in favour of the plaintiff.

[MELLOR, J. This is not like an ordinary action. Here both parties are actors, and costs must be awarded as in a feigned issue.]

This is not like a feigned issue, in which the Court may direct which party shall be plaintiff and which defendant. The costs must be taxed as in an action; that is, the plaintiff is entitled to the general costs, and the defendant only to such costs as apply exclusively to the part on which he has succeeded. *MacCarthy* v. *Nepean* (1) will be cited by the other side; but in that case the statute left the costs in the discretion of the Court, whereas in the present case they are to abide the event. *Lewis* v. *Holding* (2) and *Staley* v. *Bedwell* (3) were decided very soon after the Interpleader Act was passed, and different views were taken by the courts, but these cases are no authority on the present statute, as the costs under the Interpleader Act are in the discretion of the Court.

(1) 6 Q. B. 252. (2) 2 M. & G. 875.
(3) 10 A. & E. 145.

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[BLACKBURN, J. The costs are to abide the event of the trial, without regard to which of the parties is formally made plaintiff or defendant. The plaintiff affirmed that the defendant was entitled in respect of none of the acres; the defendant affirmed that he was entitled in respect of all; and the jury found that neither was right.

COCKBURN, C.J. "Event" applies to what the commissioner is to do as well as to the costs. Here the commissioner is to act on what the jury have found, and disallow part, and allow part. The issue is, in fact, divisible, and each party has succeeded in part.]

In *Fitzwilliam* v. *Maxwell* (1) it was held that the costs under an Inclosure Act must abide the event in the same way as under the statute of Gloster.

[MELLOR, J. There the statute was altogether silent as to costs. The question here is, what s. 56 means by "abiding the event."]

T. Jones, Q.C., in support of the rule, referred to the words of s. 56, already observed upon by the Lord Chief Justice. [He was then stopped by the Court.]

COCKBURN, C.J. The section is most inartificially drawn, and open to much doubt; but if we were to put the construction upon it for which the plaintiff's counsel contends, we should establish so anomalous a state of things as the result, that I have little hesitation in deciding against it. A man makes a claim to rights of common in respect of a certain number of acres of land, and the valuer and commissioner make an award and confirmation in his favour, that he is entitled to rights of common in respect of such and such a number of acres. The decision, therefore, in the first instance, is in the claimant's favour; but some one comes forward and objects, and avails himself of the means given by the statute; that is, he brings a feigned issue under s. 56; and the question to be tried is, whether the claimant is entitled to the allotment as made. Suppose he claims in respect of 100 acres; on further investigation, instead of 100 acres, it turns out that he is only entitled in respect of 99; the issue, it is said, is therefore found against him, because he claimed in respect of the 100 acres, and failed as to the 100th, and the plaintiff is entitled to the general costs of the cause, inasmuch as the statute says the costs

(1) 7 Taunt. 31.

shall abide the event of the trial. But this is not the fair construction of s. 56. The words are: "And after such verdict shall be given, and final judgment obtained thereon, the commissioners shall act in conformity therewith, and allow or disallow the claim thereby determined according to the event of such trial; and the costs attending any such action shall abide the event of the trial." Therefore it is clear that the commissioners must allow or disallow so much of the claim as is found for or against the claimant; and the issue is divisible; and this is what the commissioners have done or will have to do in the present case. But the words as to the costs are in the very same language; they are to abide the event of the trial. If, therefore, the event as to commissioners is that they have to allow part and to disallow part, as the costs are to abide the same event, the allowance in part and disallowance in part, each party is entitled to the costs of that part of the issue on which he has succeeded, and so justice will be done between the parties.

BLACKBURN, J. I am of the same opinion. It is quite true that in an ordinary action containing many claims the plaintiff gets the general costs of the cause if he succeeds on any part of his claim, and the defendant only gets the costs which are applicable to those issues on which he succeeds, so that the plaintiff gets a much larger proportion. But that has no application to the present case, which turns on the language used in the particular statute. [The learned judge read the chief parts of s. 56.] In such a case it is clear that the issue is divisible. Was the defendant entitled to rights of common in respect of all or any of the 198 acres? The finding of the jury is that he was right as to part, and wrong as to the other. That is the event, and accordingly the commissioners must allow the claimant so much as is found for him, and this is quite independent of which was plaintiff and which defendant. In *Fitzwilliam* v. *Maxwell* (1) there was no provision in the statute about costs, and the plaintiff was held to be entitled to the costs as in an ordinary action, and therefore the plaintiff, before the new rules, would have all the costs; but that is quite contrary to the present statute, where the costs are to abide

(1) 7 Taunt. 31.

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the event of the trial; that is, each party is to have the costs of the part in which he has succeeded. Nothing is clearer than that the costs, like the judgment of the commissioners, shall abide the event which, in the present case, is partly in favour of the plaintiff, and partly of the defendant. The master ought, therefore, to tax the costs as if there had been two separate records with a single issue in each, in which the plaintiff and defendant respectively had succeeded. The argument for the plaintiff simply amounts to this, that the right to the general costs shall depend merely upon the circumstance of which is appellant and which respondent, and not on which is right on the merits. But justice and the words of the section require just the reverse construction, otherwise the claimant would be made to suffer from having the decision of the commissioner originally in his favour.

MELLOR and HANNEN, JJ., concurred.

Rule absolute.

Attorneys for plaintiff: *Sharpe & Ullithorne.*
Attorneys for defendant: *Hancock, Sharp, Hales, & Morris.*

July 3.

WREN AND ANOTHER *v.* WEILD.

Action—Slander of Title to Personalty—Reasonable and Probable Cause—Admissibility of Evidence—Patent.

The plaintiffs brought an action, alleging in the declaration that the defendant falsely and maliciously wrote to and told persons who had bought certain machines of the plaintiffs, that the machines were infringements of the defendant's patents, and that the defendant claimed royalties for the use of the machines, and that if they used the machines without paying royalties he should take legal proceedings. The defendant pleaded not guilty.

The plaintiffs, at the trial, offered to prove various specifications and machines, existing before the date of the defendant's patent, to shew that the defendant's specification claimed matters that were not new, and also that the defendant had used them. The Judge ruled that, as the defendant's patent was still subsisting, and not set aside, on scire facias or otherwise, the evidence was immaterial, and directed a nonsuit:—

Held, that the ruling of the Judge was right; that where a person claims a right in himself which he intends to enforce against a purchaser he is entitled, and in common fairness bound, to give the intended purchaser warning of his intention; and that no action lies for giving such preliminary warning, unless it can be shewn, either that the threat was made malâ fide, only with the intent to

injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful,

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THE declaration alleged that the plaintiffs were machine makers at Manchester, and lawfully made and sold spooling machines, and charged in substance, in eight counts, that the defendant falsely and maliciously wrote or said to various persons who had purchased, or were intending to purchase, the machines of the plaintiffs, that the machines sold by the plaintiffs were infringements of the defendant's patents, and that the defendant claimed royalties for the use of the machines; and that if they used the machines without paying him royalties he should take legal proceedings, concluding with special damage by loss of custom and trade profits.

Plea: Not guilty. Issue thereon.

At the trial, before Lush, J., at the spring assizes at Manchester, the learned judge directed a nonsuit to be entered.

The course of the trial, and the facts proved, sufficiently appear from the judgment of the Court.

A rule was afterwards obtained for a new trial, on the grounds of rejection of evidence and misdirection by the learned judge. Of rejection of evidence: First, as to the want of novelty of parts of the inventions, and invalidity of the patent of the defendant: Second, as to the knowledge of the defendant of parts of the invention being old, and the invalidity of the patent in the then state of the specification; and that no action could be maintained thereon; rejection of Young's specification, and other evidence of want of novelty. Of misdirection, in that the learned judge ruled that it was only competent to the plaintiffs to shew that their machines did not infringe the patent of the defendant. Second, that the learned judge misconstrued the specification of the patent of the defendant. Third, that it was not open to the plaintiffs to shew that a part or parts of the defendant's machine was or were old to his knowledge, or that the specification was invalid as claiming parts that were old, and not distinguishing the parts that were old from the parts that were new; that the claim in the specification was not limited to the self-acting machine taken as a whole. Fourth, that it was competent to the plaintiffs to shew that the parts complained of in the plaintiffs' machine were, to the

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knowledge of the defendant, known and in use before the date of the defendant's patent. Fifth, that the stopping of the machine when the required quantity was wound might be an infringement and the subject of a valid patent.

June 15 and 16. *Quain, Q.C.*, and *Aston* shewed cause. They cited *Smith* v. *Spooner* (1); *Pitt* v. *Donovan* (2); *Earl of Northumberland* v. *Byrt* (3); *Sir G. Gerard* v. *Dickenson* (4); *Davis* v. *Gardiner* (5); *Pater* v. *Baker.* (6)

Webster, Q.C., and *Baylis*, in support of the rule. They cited *Malachy* v. *Soper* (7); *Ingram* v. *Lawson* (8); *Green* v. *Button* (9); *Evans* v. *Harlow* (10); *Sellers* v. *Dickinson.* (11)

Cur. adv. vult.

July 3. The judgment of the Court was delivered by

BLACKBURN, J. This was a rule to set aside a nonsuit, against which cause was shewn in these sittings before my Brothers Lush and Hayes and myself.

The declaration contained eight counts, to the effect that the plaintiffs made and sold spooling machines, and that the defendant *falsely and maliciously* wrote to persons in treaty with the plaintiffs for such machines that they were infringements of a patent of the defendant, and that if they were used he would claim royalties for their use, and, if not paid, take legal proceedings; in consequence of which the plaintiffs lost the sale of their machines.

There was no allegation that the defendant did this without reasonable and probable cause, nor, except in so far as might be implied from the terms of the defendant's letters (which, however, were averred to be false), did it appear on the face of the declaration that the defendant had any patent, or was other than a gratuitous intermeddler.

The defendant pleaded not guilty, upon which issue was joined.

(1) 3 Taunt. 246.
(2) 1 M. & S. 639.
(3) Cro. Jac. 163.
(4) 4 Rep. 18 a.
(5) 4 Rep. 16 b.
(6) 3 C. B. 831.
(7) 3 Bing. N. C. 371.
(8) 6 Bing. N. C. 212.
(9) 2 C. M. & R. 707.
(10) 5 Q. B. 624.
(11) 5 Ex. 312; 20 L. J. (Ex.) 417.

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On the trial before my Brother Lush it was proved that the defendant had a subsisting patent. The specification described a very complicated machine, and claimed the whole as a new combination, and also separately claimed many subordinate parts of the machine as new.

The plaintiffs' machine did not comprise in it anything precisely identical with any of those subordinate parts, but so closely resembled them as, at least, to give plausible grounds for contending that they were equivalent to them.

The plaintiffs, it appeared, were negotiating for the sale of their machines to different manufacturers, some of whom, if not all, were already using the defendant's machine under licences from him. The defendant wrote to them the letters complained of in the declaration. There were then some abortive attempts at arranging the terms of an indemnity to be given by the plaintiffs to their customers; but those going off, the customers refused to buy the plaintiffs' machine with the risk of litigation with the defendant.

The plaintiffs then brought the present action.

At the trial the plaintiffs' counsel offered to prove, in addition to the facts above stated, various specifications and machines existing before the date of the defendant's patent, which, according to his contention, would show that the defendant's specification claimed matters that were not new; and also that the defendant had himself used them, and consequently, as it was argued, knew the facts which would render his patent void. My Brother Lush was of opinion that, inasmuch as the patent was still subsisting, and not set aside on scire facias or otherwise, this evidence was immaterial.

Mr. Webster, on the argument before us, contended that this evidence would not only have shewn that the defendant's patent was void, but would also have shewn that the plaintiffs' machines were not an infringement of the patent, inasmuch as, he said, the plaintiffs did not use the whole of anything the defendant claimed; and the evidence would shew that the part they used was not new and therefore not an infringement within the rule laid down in *Sellers* v. *Dickinson*. (1)

(1) 5 Ex. 312; 20 L. J. (Ex.) 417.

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The evidence was rejected, and my Brother Lush directed a nonsuit.

The most favourable view for the plaintiffs is to consider whether,—if this evidence had been received, and had proved all that it could prove, namely, that the patent of the defendant was void, and that, even if it was good, an action brought on it against those who used the plaintiffs' machine must have failed, and that the defendant, when he wrote the letters, knew the facts which would have produced this effect,—there would have been evidence which the judge ought to have left to the jury in support of the issue in the present action. And we think that there would not have been such evidence, and consequently that the nonsuit should not be set aside.

It becomes, therefore, necessary to consider what would support the issue here joined.

No action precisely like this has ever been brought; but there is a well-known action for slander of title, where an unfounded assertion that the owner of real property has not title to it,—if made under such circumstances that the law would imply malice, or if express malice be proved, and special damage is shewn, such as, for instance, that a bargain to sell the land is lost,—is held to give a cause of action. And we see no reason why a similar rule should not apply where the false and malicious assertion relates to goods, and the damage arises from the loss of a bargain to sell them; and accordingly, in *Green* v. *Button* (1), it was held, on demurrer, that a declaration which shewed that the defendant knew that he had no claim, and that his assertion of claim of right was made falsely and maliciously, and without reasonable and probable cause, and that special damage ensued, was good. The case of *Lovett* v. *Weller* (2), and the first resolution in *Sir G. Gerard* v. *Dickenson* (3), are authorities that, without the allegation of knowledge, or, at least, of want of reasonable and probable cause, the declaration would have been bad. But it is obvious that, where a person claims a right in himself which he intends to enforce against a purchaser, he is entitled, and, indeed, in common fairness, bound, to give the intended purchaser warning of

(1) 2 C. M. & R. 707.
(2) 1 Roll. 409.
(3) 4 Rep. 18 a.

such his intention: see *Pitt* v. *Donovan* (1); and, consequently, we think no action can lie for giving such preliminary warning, unless either it can be shewn that the threat was made malâ fide, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make the bringing an action altogether wrongful.

That an action may be brought under such circumstances as to render it morally wrong and injurious in fact, is certain, though the authorities leave it in doubt whether, under any circumstances, the person so sued can recover damages for the vexation and annoyance caused to him by the false suit.

In a case reported in Maynard's Long Quinto (2), an action was brought, alleging that the now defendant forged a bond in the name of the plaintiff, and afterwards sealed it in the name of the plaintiff, and sued on it, and recovered on it. It is now quite settled that the fact that the former suit had terminated against the second plaintiff would be fatal to his right to maintain the second action, but that does not seem to have been settled law at the time, and though no decision was come to, the inclination of the Court seems to have been, that for bringing a suit so manifestly wrongful to the defendant's own knowledge, an action might be maintained.

In *Sir G. Gerard* v. *Dickenson* (3) the point seems to have been considered; and, according to the report by Lord Coke, who was himself counsel in the case, it was resolved, 2, that inasmuch as the declaration shewed that with knowledge the plaintiff was bargaining to sell his land, and the defendant alleged *against her own knowledge* that a lease, which was a forgery, and which she knew was a forgery, gave her title to the land, and the bargain was thereby lost, the action lay; and Lord Coke (4) cites the opinion in 5 Ed. 4, f. 126, with approbation. The case seems to have been a peculiarly hard one, as the defendant pleaded that she did not know that the deed was a forgery, and judgment was given against her on the assumption that she did know, because of grounds of special demurrer to the plea.

(1) 1 M. & S. 639.
(2) 5 Ed. 4, f. 126.
(3) 4 Rep. 18 a, Cro. Eliz. 196.
(4) 4 Rep. at f. 18b.

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In *Waterer* v. *Freeman* (1), which was an action for maliciously and vexatiously issuing a second fi. fa. whilst the first was unreturned, the Chief Justice says: "If a man sue me in a proper court, yet if his suit be *utterly* without ground of truth, and that *certainly known* to himself, I may have an action of the case against him for the undue vexation and damage that he putteth me unto by his ill practice." This was not necessary for the decision of the case before the Court, but it was by no means irrelevant, and is therefore an authority entitled to weight. On the other hand, in *Savile* v. *Roberts* (2), Lord Holt, in delivering the judgment of the Exchequer Chamber, expresses an opinion that no such action would lie without alleging and proving some collateral wrong, as that he was maliciously held to bail, or the like. For this he gives two reasons, first, that a man is entitled to bring an action if he *fancies* he has a right, which is in accord with Lord Ellenborough's reasoning in *Pitt* v. *Donovan*. (3) But this reason is quite consistent with Lord Hobart's position, that the action will lie where it was *certainly* known to him that the action was *utterly* without ground. His second reason is, that the law considers that the party grieved has an adequate remedy in his judgment for costs; and on this the Court of Common Pleas acted in *Purton* v. *Honnor*. (4) But this artificial reason does not apply in the present case, for whether the judgment for costs would or would not have been a recompence to the party sued, it would be none to the plaintiffs for the loss of their bargain if occasioned by a wrongful and malicious threat.

If, therefore, the plaintiffs had given evidence, on which the jury might properly find that the defendant made the communication to the intended purchasers malâ fide, and without any intention to institute legal proceedings at all against the purchasers, so that it was not a step taken in support of his real or fancied right against the purchasers, but entirely out of malice against the plaintiffs; or on which the jury might have properly found that the defendant did not (to use Lord Holt's phrase) so much as fancy he had a right, but, as Lord Hobart says, knew certainly that his claim was utterly without ground of truth, we are inclined to think that it would

(1) Hob. 266, 267.
(2) 1 Ld. Raym. 374.
(3) 1 M. & S. 639.
(4) 1 B. & P. 205.

have been proper to leave that evidence to the jury in support of the plaintiffs' allegation that the defendant's letter was false and malicious; the question whether that is enough without an express allegation of knowledge or want of reasonable and probable cause being on the record.

But we think that as soon as it was shewn in evidence that the defendant really had a patent right of his own and was asserting it, the occasion privileged the communication, and the plaintiffs were bound to prove such malice as would support the action. As the evidence which they tendered was rejected, they are entitled to a new trial if supposing it to have been received, and to have turned out as favourable as possible to the plaintiffs, it would have made a case proper to have been left to the jury. But we think that, supposing everything had been proved which the evidence tendered could have proved, there would have been no case on which the jury could properly have found for the plaintiffs. The whole reasoning of the judges in *Pater* v. *Baker* (1), seems to be strongly in support of this conclusion. The advisers of the plaintiffs seem to have thought it was enough to maintain this action to shew that the defendant could not really have maintained any action, and that if well advised he would have been told so, so as in this action indirectly to try the question whether an action for the infringement of the patent could have been maintained; whereas, as we think, the action could not lie, unless the plaintiffs affirmatively proved that the defendant's claim was not a bonâ fide claim in support of a right which, with or without cause, he fancied he had; but a malâ fide and malicious attempt to injure the plaintiffs by asserting a claim of right against his own knowledge that it was without any foundation.

The rule, therefore, must be discharged.

Rule discharged.

Attorneys for plaintiffs: *Sharp & Ullithorne.*
Attorneys for defendant: *N. C. & C. Milne.*

(1) 3 C. B. 831.

END OF TRINITY TERM, 1869.

REGULÆ GENERALES.

RULES AND SCALE OF FEES UNDER "JUDGMENTS EXTENSION ACT," 1868.

MICHAELMAS TERM, 1868.

WHEREAS it is provided by the "Judgments Extension Act, 1868," that it shall be lawful for the Judges of the Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster, or any eight or more of them, of whom the Chiefs of the said Courts shall be three, from time to time to make all such General Rules and Orders to regulate the Practice to be observed in the execution of the said Act, or in any matter relating thereto, including the Scale of Fees to be charged in the Courts of Common Law, as they may deem to be necessary and proper.

IT IS THEREFORE ORDERED that the following Rules, Orders, and Scale of Fees shall be in force, that is to say:—

I.

The register for Irish judgments to be kept by the Senior Master, under Section 1 of the said Act, shall be arranged in alphabetical order in the surname of the Defendant, where a judgment shall be registered under Form 1 in the Schedule of the Act, or in the surname of the Plaintiff where registered under Form 2 in the said Schedule: And the said Master shall enter on the said register all the further particulars relating to the judgment contained in the certificate presented for registration.

II.

The register for Scotch decreets, to be kept by the said Master under Section 3 of the said Act, shall, as to Defender or Pursuer, be arranged in like manner, and contain the like particulars as provided by the preceding rule relating to the register for Irish judgments.

III.

When an Attorney, Law-Agent, or Creditor shall present for registration to the said Master a certificate of an Irish judgment or Scotch decreet, a copy thereof shall also be produced, certified by the Attorney, Law-Agent, or Creditor to be a true copy of the original Certificate, and the said Master shall thereupon stamp such certified copy with his office stamp.

IV.

Upon the production of such copy certificate of an Irish judgment or Scotch decreet, an original of which shall have been filed with the said Master, the proper Officer shall issue execution or other process as though such judgment or decreet had been duly obtained and entered up as an English judgment in the Court of Common Pleas, at Westminster, the form of the Writ of Execution being varied accordingly:—

The Writ of Execution may be thus varied:—instead of "which the said lately in our Court of Queen's Bench at Westminster recovered, &c.," *insert* "which the said lately in our Court of [Queen's Bench at Dublin] recovered, &c., and which Judgment has been duly registered in our Court of Common Pleas at Westminster, pursuant to 'The Judgment Extension Act, 1868.'"

V.

An affidavit of the Attorney applying for a certificate of a judgment in the English Courts, of his information and belief as to the title, trade or profession, and the last known or usual place of abode of the Plaintiff or Defendant, as the case may be, shall be sufficient to justify the Officer in inserting the particulars so sworn to in his certificate.

VI.

The fees to be taken for issuing execution or other process on an Irish judgment or Scotch decreet that shall have been registered under this Act, shall be the same as in the case of an English judgment.

VII.

The fees hereinafter mentioned shall be collected, not in money, but by means of stamps denoting the amount of such fees.

SCALE OF FEES.

	£	s.	d.
For every Certificate of a Judgment issued out of the Courts of Queen's Bench, Common Pleas, and Exchequer at Westminster, for Registration in Ireland or Scotland, including Affidavit	0	2	0
Fees to be charged by the Senior Master of the Court of Common Pleas at Westminster as "Registrar of Judgments":—			
On filing for registration every Certificate issued out of the Courts of Dublin, and Court of Session in Scotland, although more than one name may have to be registered .	0	7	6
On filing every acknowledgment of satisfaction of an Irish Judgment, or Scotch Decreet, for entry on the Register .	0	2	6
For every Certificate of the entry of a satisfaction . .	0	1	0
For every search made in the Registers of Irish and Scotch Judgments, in one or both Registers, for each name .	0	1	0

Given under our hands at Westminster, this fourteenth day of November, One thousand eight hundred and sixty eight.

A. E. Cockburn.
Wm. Bovill.
Fitzroy Kelly.
J. B. Byles.
Samuel Martin.
Robert Lush.
Wm. Baliol Brett.
G. Hayes.

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See Immoral Consideration.

BANKER'S CHEQUE—Presentment—Notice of Dishonour - - - - 455
See Presentment of Cheque.

BANKRUPT—Certificate of conformity or order of discharge—Costs—Verdict and judgment after bankruptcy - - 257
See Irish Bankruptcy Act.

—— Order of discharge—Process—Overseer of poor - - - - - 285
See Order of Discharge.

—— Order of release—Sheriff—Registrar - 143
See Order of Release.

BANKRUPTCY—Act of—Bill of sale - 27
See Delaying Creditors.

—— Bankruptcy Act, 1861 - 49, 61, 271,
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—— Fraudulent preference—Relation of title of assignees - - - - 481
See Fraudulent Preference.

—— Proof of debt payable on contingency 568
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—— Proof of unliquidated damages—Bankruptcy Act, 1861, s. 153 - - - 700
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BANKRUPTCY ACT, 1849, s. 27 - - 143
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BANKRUPTCY ACT, 1861, s. 192—Deed of Composition—Reservation of rights against surety - - - - 630
See Reservation of Rights against Surety.

—— s. 153—Proof of unliquidated damages 700
See Proof of Unliquidated Damages.

—— s. 192 - - - - - 49, 61, 271
See Bankruptcy Act, 1868.
Construction of Creditors' Deed.
Unreasonableness of Creditors' Deed.

BANKRUPTCY ACT, 1868 (31 & 32 *Vict. c.* 104), *s.* 3—*Creditors' Deed—Requisite Assents in Value—Secured Creditors.*] The 31 & 32 Vict. c. 134, s. 3, is not retrospective; and therefore a deed executed before that statute came into operation must, in order to be valid under s. 192 of the Bankruptcy Act, 1861, be assented to by three-fourths in value of the creditors, taking into account the amount of secured as well as of unsecured debts. Ellis *v.* McCormick - - - - 271

BENEFICIAL OCCUPATION—*Poor-rate—Sewers, Wharf, Engine-house, Pumping Station, Rateability of.*] The Metropolitan Board of Works were empowered by 21 & 22 Vict. c. 104, and other statutes, to make the necessary sewers and works for the improvement of the main drainage of the metropolis. The sewers, except at the pumping stations, passed under the public highways of the metropolis, or under land on which the board had no property. The pumping stations were erected upon land the property of the board, but were used solely as part of the main drainage scheme. The board were also in occupation of a wharf, lay-by for barges, tramways, engine houses, coal sheds, and dwelling house, all of which were occupied for the purposes of the main drainage scheme. The board derived no pecuniary advantage from the sewers and other drainage works, but the whole were maintained out of funds raised by a rate made in pursuance of the statutes:—*Held*, that the sewers were not rateable to the poor-rate, on the ground that they were not the subject of a beneficial occupation; but that the rest of the property had an occupation value, and the board were rateable in respect of them, as

BENEFICIAL OCCUPATION—*continued.*
there was nothing in the statutes exempting them from rateability. The Queen *v.* The Metropolitan Board of Works - - - 15

BILL OF EXCHANGE—Acceptor—Liability after judgment, arrest, and discharge in another action on same bill - - - 55
See Acceptor of Bill of Exchange.

—— Notice of dishonour — Defendant's address not known - - - - 639
See Notice of Dishonour.

—— Presentment—Notice of dishonour - 455
See Presentment of Cheque.

BILL OF LADING—Property in goods shipped—Principal and agent - - 196, 493
See Property in Goods Shipped.

BILL OF SALE—Act of bankruptcy — Delaying creditors - - - - - 27
See Delaying Creditors.

BOND—Assignment—Action—Equitable plea and replication - - - - 44
See Assignment of Bond.

BREAD—*Sale otherwise than by Weight—Bread "usually sold" as French or Fancy Bread*—6 & 7 *Wm.* 4, *c.* 37, *s.* 4—3 *Geo.* 4, *c. cvi.*—1 & 2 *Vict. c.* 28.] By 6 & 7 Wm. 4, c. 37, s. 4, any baker or seller of bread, who shall sell or cause to be sold bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread without previously weighing the same:—*Held* (by Lush and Hayes, JJ.; Hannen, J., dissenting), that bread, which was usually sold as fancy bread at the time of the passing of the Act (1836), but was not usually sold as fancy bread at the time of the sale, was not within the proviso. The Queen *v.* William Wood - - - - - 559

2. —— *Sale otherwise than by Weight*—6 & 7 *Wm.* 4, *c.* 37, *s.* 4.] By 6 & 7 Wm. 4, c. 37, s. 4, any baker or seller of bread, who shall sell bread in any other manner than by weight, is subject to penalties, provided that nothing in the Act shall extend to prevent a baker or seller of bread from selling bread usually sold under the denomination of French or fancy bread without having previously weighed the same.—On an information for contravening the above section, it was proved that a purchaser went into a baker's shop and asked for a 4 lb. loaf; a loaf was handed to him by the baker, which turned out substantially deficient in weight. The purchaser did not ask to have the loaf weighed, and there was no evidence as to whether the loaf had ever been weighed or not. The baker contended that the loaf was fancy bread. The justices having convicted the defendant:—*Held*, that the customer having asked for bread by weight, the baker was bound to sell by weight, whether the bread was ordinary or fancy bread; and though he was not bound to weigh in the presence of the customer, unless requested to do so, he was bound to weigh at some time or other, and that, as the loaf was substantially deficient in weight, it must be taken, as against the baker, that he had never weighed it; and the conviction was therefore right. The Queen *v.* Kennett. The Queen *v.* Saunders [565

"BRIBERY"—*Parliamentary Election—Municipal Election*—17 & 18 *Vict. c.* 102, *s.* 2—22 *Vict. c.* 35, *s.* 12.] By 17 & 18 Vict. c. 102, s. 2, and 22 Vict. c. 35, s. 12, every person shall be deemed guilty of "bribery," who shall . . . offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration to or for any voter . . . to induce him to vote . . . at any parliamentary or municipal election.—The defendant, soliciting the vote of a voter, said "he should be remunerated for any loss of time:"—*Held*, that this was an offer or promise within the sections. Simpson *v.* Yeend - - - - - 626

BROUGHAM'S, LORD, ACT, s. 5 - - 330
See County Courts Act, 1867.

BURGESS LIST—Inhabitant householder—Municipal Corporation Act, s. 9 110, 114
See Inhabitant Householder. 1, 2.

CAPTURE—*Marine Insurance—Deposit of Value of Goods in Prize Court—Total Loss.*] The plaintiffs made insurance with the defendants on goods on board ship from Liverpool to Matamoras against the usual perils, including "takings at sea, arrests, restraints, and detainments of all kings," &c.; and the policy contained a clause that "it shall be lawful to the insured, &c., to sue, labour, and travel for, in, and about the defence, safeguard, and recovery of the subject matter of the insurance, without prejudice to this insurance, the charges whereof the company will bear in proportion to the sum hereby insured," and that "the acts of the insurer or insured, in recovering, saving, or preserving the property insured, shall not be considered a waiver or acceptance of abandonment." While on her voyage, the ship was, on the 5th of November, 1863, seized by a cruiser of the United States of America, and taken to New Orleans, where a suit was instituted by the captors against the ship and cargo for the purpose of having them adjudged a lawful prize. The plaintiffs at this time elected to treat the seizure as a partial loss. On the 16th of June, 1864, the prize court gave judgment against the captors, and decreed restitution of the ship and cargo. On the 1st of July the captors appealed. On the 12th of September the plaintiffs, who then knew for the first time that there was an appeal, gave notice of abandonment, which the defendants refused to receive. On the 7th of December, 1864, and the 9th of February, 1865, the plaintiffs informed the defendants that the Prize Commissioner had applied to the court to sell the ship and cargo. The sale of the goods could have been prevented by depositing the full value of the goods, or giving bail for them in the prize court, estimated in paper currency; at this time the paper currency was at 150 to 180 per cent. discount, and subject to great and sudden fluctuations. The plaintiffs and defendants declined to take either of these steps, and on the 25th of May, 1865, the ship and cargo were sold by order of the court:—*Held*, that the prolongation of the litigation by the captors appealing was not more than might have been reasonably anticipated when the ship and cargo were first libelled, and that the appeal did not amount to such a change of facts as would justify the assured in changing their election, and that the assured could not, by their notice of abandonment, make the loss by the seizure

CAPTURE—*continued.*
and detention a total loss; but that depositing the full value of the goods in paper currency or giving bail for them were acts which a prudent uninsured owner would not have adopted to prevent the sale, and that the sale was, therefore, a total loss occasioned by the seizure, for which the plaintiffs were entitled to recover. STRINGER *v.* THE ENGLISH, &c., INSURANCE COMPANY - - - 676

CARRIER — Railway — Declaration of value of goods—Special contract - - 244
See DECLARATION OF VALUE OF GOODS.

—— Railway—"Ordinary" or "personal" luggage—Child's plaything - - 366
See PASSENGER'S LUGGAGE. 2.

—— Railway—Roadworthiness of carriage 379
See ROADWORTHINESS OF CARRIAGE.

CARRIERS ACT, ss. 1, 6 - - - - 244
See DECLARATION OF VALUE OF GOODS.

CASES—*Anglo-Italian Bank and De Rosaz, Re* (Law Rep. 2 Q. B. 452) followed - 462
See COMPANIES ACT, 1862.

—— *Cowen, Ex parte* (Law Rep. 2 Ch. App. 563) followed - - - - 61
See CONSTRUCTION OF CREDITORS' DEED.

—— *Craven* v. *Smith* (Law Rep. 4 Ex. 146) distinguished - - - - 643
See DAMAGES NOT EXCEEDING 10*l.* 2.

—— *Flureau* v. *Thornhill* (2 W. Bl. 1078) discussed - - - - 659
See REFUSAL OF VENDOR TO GIVE POSSESSION.

—— *Gray* v. *West* (Law Rep. 4 Q. B. 175) distinguished - - - - 643
See DAMAGES NOT EXCEEDING 10*l.* 2.

—— *Great Eastern Railway Company* v. *Haughley* (Law Rep. 1 Q. B. 666) followed - 354
See CONTRIBUTIVE VALUE.

—— *Hornby* v. *Close* (Law Rep. 2 Q. B. 153) followed - - - - 602
See FRIENDLY SOCIETY.

—— *Lloyd* v. *Harrison* (Law Rep. 1 Q. B. 502) followed - - - - 143
See ORDER OF RELEASE.

—— *Maughan* v. *Vinesberg* (Law Rep. 3 C. P. 318) dissented from - - 257
See IRISH BANKRUPTCY ACT.

—— *Ricket* v. *Metropolitan Railway Company* (Law Rep. 2 H. L. 175) explained 358
See OBSTRUCTION OF PUBLIC RIGHT.

"CATTLE" — *Action — Mischievous Animal — Scienter* —28 & 29 *Vict. c.* 60, *s.* 1.] Section 1 of 28 & 29 Vict. c. 60, enacts that the owner of every dog shall be liable in damages for injury done to any cattle or sheep by his dog; and it shall not be necessary for the party seeking such damages to shew a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity:—*Held*, that the word "cattle" in the above section includes horses and mares. WRIGHT *v.* PEARSON - - - - - 582

CATTLE ON HIGHWAY — *Highway Act*, 1864 (27 & 28 *Vict. c.* 101), *s.* 25—*Right of Pasturage.*] By 27 & 28 Vict. c. 101, s. 25, if any horse, ox, &c., is found straying on or lying about any highway, or across any part, or by the sides thereof, the owner shall be liable to a penalty not exceeding

CATTLE ON HIGHWAY—*continued.*
1*s.* for each animal, provided that nothing in the Act shall be deemed to extend to take away any right of pasturage which may exist on the sides of any highway:—*Held*, that the owner of cattle found straying on the metalled part of a highway was liable to a penalty, notwithstanding he had a right of pasturage on the sides of it. GOLDING *v.* STOCKING. FREESTONE *v.* CASSWELL 516

CENTRAL CRIMINAL COURT — Jurisdiction — 4 & 5 Wm. 4, c. 36, ss. 1 & 2—30 & 31 Vict. c. 142, s. 35 - - - - 394
See JURISDICTION OF CENTRAL CRIMINAL COURT.

CERTIFICATE OF CONFORMITY — Irish Bankruptcy Act—Costs—Proof - 257
See IRISH BANKRUPTCY ACT.

CERTIORARI—Practice - - - 585
See SPECIAL CONSTABLES.

CHARTERPARTY — Time for discharge — Contract implied by law - - 127
See TIME FOR DISCHARGE.

CHEQUE—Presentment—Notice of dishonour 455
See PRESENTMENT OF CHEQUE.

CHOSE IN ACTION—*Husband and Wife—Chose in Action given to Wife during Marriage—Money had and received.*] The defendant received money from a third person to be appropriated to the use of a married woman, and he wrote telling her he held the money at her disposal. The wife died, and then the husband; and the wife's administratrix sued the defendant for money had and received to the use of the wife:—*Held* (affirming the judgment of the Queen's Bench; Kelly, C.B., dissenting), that the action was rightly brought by the wife's representative, as the facts shewed only a chose in action conferred on the wife, with which the husband had not interfered during coverture. FLEET *v.* PERRINS - Ex. Ch. 500

—— Bond—Assignment—Action—Equitable plea and replication - - - 44
See ASSIGNMENT OF BOND.

CHURCH BUILDING ACTS—Notice for holding vestry - - - - 577
See NOTICE FOR HOLDING VESTRY.

COLONY — Power of governor to assent to enactment in his own favour—Lex loci 225
See LEX LOCI.

COMITAS GENTIUM — Lex loci and lex fori — Right of action in England for tort committed in a colony - - - 225
See LEX LOCI.

COMMON CARRIER: *See* CARRIER.

COMMON LAW PROCEDURE ACT, 1854, s. 12 462
See COMPANIES ACT, 1862.

COMMUNICATION, PRIVILEGED: *See* PRIVILEGED COMMUNICATION.

COMPANIES ACT, 1862 (25 & 26 *Vict. c.* 89), *ss.* 161 & 162 — *Arbitration — Appointment of Umpire by Judge's Order — Companies Clauses Act*, 1845 (8 *Vict. c.* 16), *ss.* 128–134—*Common Law Procedure Act*, 1854 (17 & 18 *Vict. c.* 125), *s.* 12—*Action upon Award—Shareholder, Purchase of Interest of—Joint Stock Company, Voluntary Winding-up of—Equitable Plea.*] Declaration, that the defendants were a banking company incorporated

COMPANIES ACT, 1862—*continued.*
under the Companies Act, 1862; that a resolution was passed for the winding up of the company and the transfer of the business to another company; that plaintiff was a shareholder in the first company, and expressed a dissent in writing as required by s. 161 of the statute, and required the liquidators either to abstain from carrying the resolution into effect, or to purchase his interest; that by the articles of association, in the event of any difference arising between the company and any of the shareholders, such difference was to be referred to two arbitrators, one of the arbitrators to be named by each party; the arbitrators to appoint an umpire; and if they did not do so within fourteen days, an umpire might be appointed by a judge under the Common Law Procedure Act, 1854; that the dispute relating to the settling of the price of the plaintiff's shares was referred to two arbitrators; that they did not appoint an umpire; that an umpire was appointed by a judge; that the arbitrators did not agree; that the umpire duly made his award adjudging the price to be paid for the purchase of the plaintiff's interest at 2100*l.*, which sum he directed to be paid to the plaintiff, and further directed that the defendants should pay to the plaintiff his costs of the reference and award, and that the defendants did not pay the money. On demurrer:—*Held*, 1. That an action would lie against the company on the award as in ordinary cases, as there was nothing in s. 161 of the statute which took away the right of action. 2. That the judge had power to appoint an umpire under the articles of association, or under the Companies Clauses Consolidation Act, 1845, supplemented by the Common Law Procedure Act, 1854, on the authority of *Re Anglo-Italian Bank and De Rosaz* (Law Rep. 2 Q. B. 452). Plea to the declaration, on equitable grounds, that before the passing of the resolution the plaintiff was indebted to the defendants in respect of a call upon his shares, and the shares were liable to forfeiture, and that the defendants were proposing to reconstitute their bank, and that it was agreed that, in consideration that the defendants would forbear from pressing for payment of the money due to them, and would give the plaintiff time for payment, and would abstain from forfeiting the shares, the plaintiff promised to consent to the winding up of the company, if authorized by a general meeting, and that he would vote for the resolution, and exchange his shares for shares in the reconstituted bank; that the defendants performed their part of this agreement; that the proposal was authorized by a general meeting, and that the resolution was passed. On demurrer:—*Held*, that the plea only shewed grounds for a cross action by the defendants, and was no defence to the present action. De Rosaz *v.* The Anglo-Italian Bank, Limited. [462

COMPANIES CLAUSES ACT, 1845, ss. 128–134
See Companies Act, 1862. [462

COMPANY—Libel—Privileged communication—Evidence of malice - - - 262
See Privileged Communication.
Railway Company.
Telegraph Company.

COMPENSATION—Lands Clauses Act, 1845—Obstruction to public right - 358
See Obstruction to Public Right.

—— Lands Clauses Act, 1845—Loss of trade profits
See Loss of Trade Profits. [190

—— Public Health Act, 1848 - - 351
See Public Health Act, 1848.

COMPROMISE OF ACTION—Attorney's lien on damages for costs - - - 153
See Lien on Damages for Costs.

COMPULSION OF LAW—Assignment—Covenant not to build - - - - 180
See Covenant not to Build.

CONCEALMENT—Marine insurance - 523
See "Port or Ports of Loading."

CONDITIONS—Railway company—Passengers' luggage—Railway and Canal Traffic Act
See Passengers' Luggage. 1. [539

CONDITIONS OF SALE—*Vendor and Purchaser—Title.*] The plaintiff contracted to purchase of the defendants a house described as a "freehold" residence, &c.,—being lot 2 referred to in the particulars—subject to certain conditions of sale, and paid the deposit. Condition 5: "The abstract of title to lots 1, 2, and 3 (being the freehold portion of the property), will commence with a conveyance of the 17th of April, 1860, and no purchaser shall investigate, or take any objection in respect of the title prior to the commencement of the abstract." 9. "If any error or misstatement shall appear to have been made in the particulars of sale, it is not to annul the sale; but shall entitle the purchaser to compensation." The abstract of the deed of the 17th of April, 1860, recited an indenture of the 2nd of March, 1850, whereby E. assigned to R. in fee, and another deed whereby R. assigned to certain trustees in fee, and by the deed the trustees conveyed to the defendants' testator in fee, subject (so far as the premises were subject thereto), to the covenants and conditions on the part of the grantee, his heirs and assigns, in the said indenture of the 2nd of March, 1850. The plaintiff refused to complete the purchase without further explanation of what these covenants and conditions were, and the defendants refused any further abstract, relying on the 5th and 9th conditions:—*Held*, that the property having been sold as "freehold," the plaintiff was entitled to have an unencumbered freehold title under the deed of the 17th of April, 1860: and the 5th and 9th conditions did not protect the defendants; and the plaintiff was therefore entitled to rescind the contract and recover the deposit, &c. Phillips *v.* Caldcleugh - - - 159

CONSECRATED GROUND—Faculty—Secular purposes - - - - - 407
See Prohibition to Ecclesiastical Court.

CONSIDERATION, IMMORAL: *See* Immoral Consideration.

CONSIGNOR AND CONSIGNEE—Property in goods shipped—Principal and agent 196, 493
See Property in Goods Shipped.

CONSPIRACY—Member of parliament—Vexatious Indictments Act - - 573
See Vexatious Indictments Act.

CONSTABLES, SPECIAL: *See* SPECIAL CONSTABLES.

CONSTRUCTION—"Cattle"—28 & 29 Vict. c. 60, s. 1 - - - - - 582
See CATTLE.

—— Charterparty—Time for discharge—Contract implied by law - - 127
See TIME FOR DISCHARGE.

—— Marine insurance—"Port or ports of loading" - - - - 523
See "PORT OR PORTS OF LOADING."

—— Mortgage—Estoppel - - - 293
See MORTGAGE NOT EXECUTED BY MORTGAGEE.

—— "Usually sold"—6 & 7 Wm. 4, c. 37, s. 4
See BREAD. 1, 2. [559, 565

CONSTRUCTION OF CREDITORS' DEED—*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Release—Deed unduly favouring Debtor.*] In an action of debt, the defendant pleaded a deed between himself, a trustee, and all his creditors, by which the defendant covenanted with the creditors respectively, if the deed were duly registered under the Bankruptcy Act, 1861, to pay to each of his creditors such sums as should in the aggregate be at the rate of 2*s.* in the pound upon the amount which would have been proveable against him if he had become bankrupt at the date of the registration, by two instalments of 1*s.* each. And it was agreed that the trustee should hold the defendant's property, already assigned to him, in trust for the defendant until default, provided that, if default was made in payment of the composition or any instalment thereof, the trustee should sell and apply the proceeds, inter alia, in payment rateably of the debts due to the creditors. The creditors for themselves respectively released the defendant from the debts due to the creditors respectively: and it was agreed and declared that in case default should be made, contrary to the covenant, in payment of the composition, or any instalment thereof, to the creditors respectively, then the release should be at an end, and the creditors should be at liberty to sue for the full amount of their respective debts less any amount already received. The plea then averred that the deed had been duly registered under s. 192, and the plaintiff was bound thereby. The plaintiff replied that the instalments due to divers creditors, other than the plaintiff, had not been paid or tendered. On demurrer:—*Held*, that upon the proper construction of the deed, the release was an absolute release by each of the creditors of his own debt, subject to be avoided as against him if the instalments due to him were not paid; that the plea was therefore good without alleging such payment or tender; and that the replication was bad.—The plaintiff also replied, on equitable grounds, that he was not an assenting creditor; that at the time the deed was executed the defendant was possessed of available assets sufficient to pay a much larger composition than 2*s.* in the pound; that the deed was not bonâ fide entered into or assented to by the majority of creditors for the equal benefit of all the defendant's creditors, but was entered into and assented to by such majority solely from motives of benevolence and kindness to the defendant, and for his sole and only benefit, and without just regard to the rights and interests of the other creditors of the defendant. On demurrer:—*Held*, a good replication, as shewing the deed was not valid within s. 192, on the authority of *Ex parte Cowen* (Law Rep. 2 Ch. App. 563). HART *v.* SMITH - - 61

CONSTRUCTION OF CREDITORS' DEED—*contd.*

CONTEMPT OF COURT—Prisoner—Gaoler—Discharge - - - - 486
See GAOLER.

CONTINGENCY—*Bankruptcy—Proveable Debt—Liability to Pay Money*—12 & 13 *Vict. c.* 106, *s.* 178; 24 & 25 *Vict. c.* 134, *s.* 154.] In January, 1866, a company lent a sum in consols to be deposited by the promoters of a bill then before parliament; and the two plaintiffs, the defendant, and three others entered into an undertaking with the company, that, if the bill was thrown out the consols should be returned, and if it passed, an equal amount of stock should be transferred to the company, and that a sum, in the nature of interest on the value of the consols at the time they were lent, from the end of six months to the date of the transfer, should be paid to the company. In April, 1866, the defendant was adjudged bankrupt; and in July he obtained his order of discharge. In August the bill was passed, but the consols were not transferred to the company till May, 1867, and the plaintiffs were compelled in June, 1867, to pay under the undertaking 500*l.* as the interest. An action having been brought by the plaintiffs to recover contribution from the defendant of one-sixth of the 500*l.*, the defendant pleaded his discharge in bankruptcy:—*Held*, that as the liability under the undertaking depended on an uncertain event, viz. the date at which the consols should be transferred, the amount of liability was not capable of being ascertained; and the plaintiffs' claim was therefore not a debt proveable under 12 & 13 Vict. c. 106, s. 178, nor under 24 & 25 Vict. c. 134, s. 154; and the defendant was therefore not discharged. CARY *v.* DAWSON - - 568

CONTRACT—Charterparty—Implication of law as to time for discharge - - 127
See TIME FOR DISCHARGE.

—— Divisibility—Railway - - - 244
See DECLARATION OF VALUE OF GOODS.

—— Immoral consideration—Pledge - 309
See IMMORAL CONSIDERATION.

—— Privity—Telegraph company—Mistake in message - - - - 706
See TELEGRAPH COMPANY.

—— Railway—Declaration of value of goods 244
See DECLARATION OF VALUE OF GOODS.

—— Ratification by infant - - - 1
See RATIFICATION BY INFANT.

CONTRIBUTIVE VALUE—*Poor-rate—Railway.*] The E. V. Railway runs through the parish of L., and forms a junction with the appellants' railway, who occupy the E. V. Railway at a fixed rent. On appeal against a poor-rate in the parish of L.:—*Held*, that the case was governed by *Great Eastern Railway Company* v. *Haughley* (Law Rep. 1 Q. B. 666), and that the appellants were to be rated only in respect of the profits which the

CONTRIBUTIVE VALUE—*continued.*
E. V. Railway earned within the parish of L., and that the value of the traffic contributed by the E. V. Railway to the appellants' main line of railway ought not to be taken in consideration, in estimating the amount of the rate in the parish of L. THE QUEEN *v.* THE INHABITANTS OF LLANTRISSANT - - - - - - 354

COPYRIGHT—Fine Arts — Expunging entry—"Person aggrieved"—Photograph 715
See FINE ART COPYRIGHT.

CORONER—*Election*—7 & 8 *Victoria c.* 92—*Sheriff's Declaration of Election final.*] Quo warranto, calling on the defendant to shew by what authority he exercised the office of coroner for a district of a county. Plea, that after 7 & 8 Vict. c. 92, a writ was issued to the sheriff, commanding him to elect a coroner; that the sheriff duly appointed and held a court for the purpose; and that the defendant, being duly qualified, was one of three candidates nominated, and a poll being demanded was duly taken the next day but one, and at the close of the poll the poll books were duly sealed, and delivered to the sheriff; that the court reassembled on the day next but one after the close of the poll, and the sheriff then opened the books and cast up the number of votes, and openly declared the state of the poll, and made proclamation that the defendant was duly chosen by a majority of such persons residing within the district as were duly qualified to vote:—*Held*, that the plea was good without alleging that the defendant was duly elected by a majority of duly qualified voters: for that the sheriff exercises judicial functions in holding a court for the election of coroner; and his declaration, therefore, of the election is final, and the validity of votes cannot be inquired into on a quo warranto. THE QUEEN *v.* DIPLOCK - - - - 549

CORPORATION, MUNICIPAL: *See* MUNICIPAL CORPORATION.

COSTS — Attorney's lien — Damages — Compromise of action - - - 153
See LIEN ON DAMAGES FOR COSTS.

—— County Courts Act, 1867 - - 330
See COUNTY COURTS ACT, 1867.

—— Damages not exceeding 10*l.*—County Court Acts - - - 175, 643
See DAMAGES NOT EXCEEDING 10*l.* 1, 2.

—— Proof in bankruptcy — Verdict and judgment after bankruptcy - - 257
See IRISH BANKRUPTCY ACT.

—— Security — Insolvent assignee suing for creditors - - - - 590
See SECURITY FOR COSTS.

—— Trial of issue under 8 & 9 Vict. c. 118, s. 56
See INCLOSURE ACTS. [725

"COSTS TO ABIDE EVENT OF TRIAL"—8 & 9 Vict. c. 118, s. 56 - - - 725
See INCLOSURE ACTS.

COUNCILLOR, TOWN: *See* ELECTION OF TOWN COUNCILLOR.

COUNTY COURT JURISDICTION — *Ejectment* — *"Value of Tenements" in County Courts Act*, 1867 (30 & 31 *Vict. c.* 142), *s.* 11—*Prohibition.*] By the County Courts Act, 1867, s. 11, all actions

COUNTY COURT JURISDICTION—*continued.*
of ejectment, where "neither the value of the tenements, nor the rent payable in respect thereof, shall exceed 20*l.* by the year," may be brought in the county court of the district in which the tenements are situate.—A lessee for years with a rent reserved, brought ejectment in a county court; the annual value of the premises to let to an occupying tenant was more than 20*l.*, but the value of the plaintiff's interest, after deducting the rent he paid, was less than 20*l.* The county court judge having decided that he had jurisdiction:—*Held*, that "the value of the tenements" means the actual marketable value, and of this the rent at which the tenements would let was a fair criterion. Secondly, that the judge having assumed jurisdiction, not by deciding on conflicting facts, but on a wrong assumption as to a point of law, the Court could review his decision by prohibition. ELSTON *v.* ROSE - - - 4

COUNTY COURTS ACT, 1867 (30 & 31 *Vict. c.* 142), *s.* 33, *sch.* (*C.*)—*Action before and Verdict after Act—County Courts Acts* (9 & 10 *Vict. c.* 95, *s.* 128; 13 & 14 *Vict. c.* 61, *ss.* 11, 12; 15 & 16 *Vict. c.* 54, *s.* 4)—*Statute of Gloster* (6 *Ed.* 1, *c.* 1)—*Revival of Repealed Statute—Lord Brougham's Act*, 13 & 14 *Vict. c.* 21, *s.* 5.] An action on contract was commenced in the Court of Queen's Bench before the passing of the County Courts Act, 1867 (30 & 31 Vict. c. 142), and a verdict was recovered for less than 20*l.* after that statute came into operation. At the time of action brought the superior court had concurrent jurisdiction over the cause of action, under s. 128 of 9 & 10 Vict. c. 95; but that section and all other sections of the former County Courts Acts as to costs were repealed by 30 & 31 Vict. c. 142, s. 33; and fresh enactments substituted, by s. 5, as to actions commenced after the passing of the Act:—*Held*, by Lush, Hannen, and Hayes, JJ., that the Statute of Gloster was not repealed as to such an action by any of the restrictive sections of the former County Courts Acts as to costs, and the plaintiff was therefore entitled to costs under the Statute of Gloster. In a similar case, but where there was neither concurrent jurisdiction in the superior court, nor any sufficient reason for bringing the action in the superior court:—*Held*, by Lush and Hayes, JJ., that as to such an action the Statute of Gloster had been repealed by the restrictive sections in the former County Courts Acts; and that Lord Brougham's Act (13 & 14 Vict. c. 21), s. 5, prevented the Statute of Gloster reviving on the repeal of those enactments by 30 & 31 Vict. c. 142; and the plaintiff was therefore not entitled to costs.—But, by Hannen, J., the restrictive sections of the former County Courts Acts only added conditions to the general enactment of the Statute of Gloster; and the repeal of those sections by 30 & 31 Vict. c. 142, removed those conditions, and left the plaintiff entitled to costs under the Statute of Gloster: and 13 & 14 Vict. c. 21, s. 5, had no application to such a case. LEVI *v.* SANDERSON. MIFFIN *v.* ATTWOOD - 330

—— s. 11 - - - - - - 4
See COUNTY COURT JURISDICTION.

COUNTY GAOL—Discharge by render to - 149
See ARREST ON MESNE PROCESS.

COURSE OF EMPLOYMENT—*Master and Servant —Negligent Driving of Servant.*] The defendant, a wine merchant, sent his carman and clerk with a horse and cart to deliver some wine, and bring back some empty bottles; on their return, when about a quarter of a mile from the defendant's offices, the carman, instead of performing his duty, and driving to the defendant's offices, depositing the bottles, and taking the horse and cart to the stables in the neighbourhood, was induced by the clerk (it being after business hours) to drive in quite another direction on business of the clerk's; and while they were thus driving the plaintiff was run over, owing to the negligence of the carman:—*Held*, that the defendant was not liable: for that the carman was not doing the act, in doing which he had been guilty of negligence, in the course of his employment as servant. Storey *v.* Ashton - 476

COURT, ECCLESIASTICAL - - - 407
See Prohibition to Ecclesiastical Court.

COVENANT NOT TO ASSIGN — *Landlord and Tenant—Licence.*] The plaintiff demised premises in 1860 to T. and P. for fourteen years. The lease contained a covenant by the lessees (not expressed to be on behalf of their assigns), not to assign or part with the possession of the premises without the written consent of the landlord; with a clause of re-entry in case of breach. By a letter of the 25th of March, 1865, the plaintiff assented to a transfer of the lease by the lessees to W. on the same terms as they held it. W., who had purchased the term from them, entered into possession without any formal assignment of the term. W. continued in possession, paying rent, until 1867, when by the written licence of the plaintiff he assigned all his interest in the lease to trustees for his creditors. The trustees sold the lease to the defendant, and he entered into possession. On ejectment for a forfeiture by breach of the covenant not to assign without licence:—*Held*, that there had been no forfeiture; that it was unnecessary to decide whether the covenant would have bound assigns though not named, as there never was any assignee of the whole term, so as to be subject to the covenants in the lease. That the parting with possession by the original lessees to W. without a complete transfer was not a forfeiture: as the licence of the 25th of March, 1865, did not in terms forbid such a parting with possession; and that the possession by the cestui que trusts and the subsequent dealing with the property by them could not be considered the acts of the original lessees, and a breach of covenant by them. West *v.* Dobb 634

COVENANT NOT TO BUILD — *Meaning of "Assigns"—Assignment by compulsion of Law.*] Declaration: that the defendant, in 1840, demised by deed certain premises to the plaintiff for a long term of years, and the defendant covenanted that "neither he nor his assigns would, during the term, permit any messuage, &c., to be built on a paddock fronting the demised premises;" alleging as breaches, 1, that the defendant during the term permitted a railway station to be built on the paddock; 2, that the defendant assigned the paddock to a railway company, who erected the railway station on the paddock. Plea: that after the making of the lease the railway company required to take the paddock under powers given them by

COVENANT NOT TO BUILD—*continued.*
an Act of Parliament of 1862, for purposes for which they were by the Act empowered to take the same; that the paddock was land which the company were empowered to take compulsorily for the purposes of the undertaking authorized by the Act; and that the company under the powers so conferred did compulsorily purchase and take the paddock, and that the assignment by the defendant to the company was the assignment in completion of such compulsory purchase; that the company afterwards built on the paddock the erections complained of, which were erections reasonably required for the purposes of the undertaking authorized by the Act.—Replication: that though the erections were reasonable, it was not necessary or compulsory for the company to build them.—On demurrers to the plea and replication:—*Held*, that the defendant was entitled to judgment: for the defendant was discharged from his covenant by the subsequent Act of Parliament, which compelled him to assign to the railway company, and so put it out of his power to perform the covenant, on the principle of the maxim, "lex non cogit ad impossibilia;" and that it could make no difference whether the company were only empowered or were compelled to build the station on the paddock. Baily *v.* De Crespigny - - 180

CREDITOR—Bankruptcy—Bill of sale - 27
See Delaying Creditors.
——: *See* Bankruptcy.
Bankruptcy Act, 1861.
Bankruptcy Act, 1868.

CREDITORS' DEED — Bankruptcy Act, 1868—Requisite assents—Secured creditors 271
See Bankruptcy Act, 1868.
—— Construction—Release—Unreasonableness 61
See Construction of Creditors' Deed.
—— Reservation of rights against surety - 630
See Reservation of Rights against Surety.
—— Unreasonableness—Inequality - 49
See Unreasonableness of Creditors' Deed.

DAMAGES—Lien for costs—Compromise - 153
See Lien on Damages for Costs.

DAMAGES, MEASURE OF: *See* Measure of Damages.

DAMAGES NOT EXCEEDING £10—*Costs*—30 & 31 *Vict. c.* 142, *s.* 5—*Slander.*] By 30 & 31 Vict. c. 142, s. 33, sch. (C), all the sections of previous county court acts as to costs are repealed; and by s. 5, if in an action commenced after the passing of the Act in any of the superior courts, the plaintiff shall recover a sum not exceeding 10*l.* in an action of tort, he shall not be entitled to any costs, unless the judge certify that there was sufficient reason for bringing the action in the superior court, or the court or a judge at chambers shall by rule or order allow such costs.—In an action for slander commenced in a superior court after the passing of the Act, a verdict was found for the plaintiff for 10*l.*, and the judge refused to certify. On an application to the court for costs:—*Held*, assuming s. 5 to apply to cases in which the county court had no jurisdiction, that, as the plaintiff had recovered an amount much beyond what would have entitled him to costs under the general law applicable to actions for

DAMAGES NOT EXCEEDING £10—*continued.*
slander, and as he could not have sued in the county court, he ought to be allowed his costs. Gray *v.* West - - - - 175

2. —— *Costs*—30 & 31 *Vict. c.* 142, *s.* 5—*Slander.*] By 30 & 31 Vict. c. 142, s. 5, if in an action of tort commenced after the passing of the Act in any of the superior courts the plaintiff shall recover a sum not exceeding 10*l.*, he shall not be entitled to any costs, unless the judge certify that there was sufficient reason for bringing the action in the superior court, or the Court or a judge at chambers shall by rule or order allow such costs. In an action for slander commenced in a superior court after the passing of the Act, a verdict was found for the plaintiff for 3*l.*, and the judge refused to certify. On an application to the Court for costs:—*Held*, that s. 5 applies to all actions whether they can be brought in the county court or not.—The Court, in reviewing the refusal of the judge to give the plaintiff his costs in an action in which less than the statutable limit has been recovered, will take into consideration all the circumstances of the case: and the fact that the action could not be brought in the county court is merely one element in determining the exercise of their discretion.—*Gray* v. *West* (Law Rep. 4 Q. B. 175), and *Craven* v. *Smith* (Law Rep. 4 Ex. 146), distinguished. Sampson *v.* Mackay - - 643

DEBATE IN PARLIAMENT—Libel—Privileged publication - - - - 73
See Privileged Publication.

DEBTOR AND CREDITOR.
See Bankruptcy.
Bankruptcy Act, 1861.
Bankruptcy Act, 1868.

DECLARATION AGAINST INTEREST—*Evidence—Poor—Settlement by Renting a Tenement, under* 6 *Geo.* 4, *c.* 57, *s.* 2—*Evidence of Payment of the Rent—Presumption of Payment from Undisturbed Occupation.*] A declaration or written entry by a deceased person when occupier of a house that he was tenant at so much rent, and had paid it, is admissible evidence, as a declaration against proprietary interest, to prove the fact of the payment as well as of the tenancy, and so to shew that the deceased had acquired a settlement, under 6 Geo. 4, c. 57, s. 2, by renting a tenement.—*Quære*, whether undisturbed occupation for four years by a person proved to be a tenant at a rent, is not presumptive evidence that the rent has been paid. The Queen *v.* Exeter Governors 341

DECLARATION OF VALUE OF GOODS—*Carrier—Special Contract—Divisibility of Contract—Carriers Act* (11 *Geo.* 4 *& 1 Wm.* 4, *c.* 68), *ss.* 1, 6—*Railway and Canal Traffic Act* (17 *& 18 Vict. c.* 31), *s.* 7.] Declaration, that plaintiffs delivered on board defendants' ship certain pictures on terms agreed between them; amongst others, that defendants should carry the pictures on board their ship fom Rotterdam to Harwich, with liberty to tranship them on any other steamer or railway, and deliver the same to plaintiffs at the port of London viâ Harwich, certain perils excepted, for certain freight to be paid by plaintiffs to defendants; that the defendants did not deliver the pictures to the plaintiffs, although a reasonable time had elapsed, and they had not been prevented by any of the excepted perils. — Plea, that the pictures were goods within s. 1 of the Carriers Act, and were delivered to defendants, they being common carriers by land for hire between Harwich and London, to be by them as such carriers by land carried from Harwich to London and delivered to plaintiffs in London; that the goods were contained in one package and exceeded 10*l.* in value; and that at the time of the delivery to defendants' servants the value and nature of the goods were not declared by the persons delivering them; and that the non-delivery by defendants to plaintiffs was by reason of the same being lost out of defendants' possession while being carried from Harwich to London.—The defendants, a railway company, carried on the business of carriers between Rotterdam and London viâ Harwich, the sea journey being performed by their steamships, and the land portion between Harwich and London by their railway. A case of pictures was delivered to the defendants' agents in Rotterdam for carriage to London, and the defendants' agent signed a bill of lading: "Shipped in good order on board the A. . . . one small case pictures . . . with liberty to tranship the same on board any other steamer or railway, and are to be delivered at the port of London viâ Harwich, the act of God (and various sea perils), also railway accidents being excepted, unto P. & Co. (the plaintiffs) or assigns . . . weight, contents, and value unknown, and not answerable for leakage, breakage, &c., and for wrong delivery of goods caused by error or by insufficiency in marks or numbers." The case containing the pictures was placed on board the defendants' ship A. at Rotterdam, and unshipped at Harwich, and forwarded by the defendants' railway, and was lost in the course of transit between Harwich and London. No declaration of the value, 84*l.*, was ever made. —The Carriers Act, s. 1, enacts that no common carrier by land shall be liable for the loss of any articles of a certain description, inter alia, pictures, contained in any package delivered to be carried, when the value exceeds 10*l.*, unless at the time of the delivery at the office or to the servant of the carrier the nature and value be declared, and an increased charge paid. By s. 6 it is provided that nothing in the Act shall extend or be construed to annul or in anywise affect any special contract between a common carrier and any other parties for the conveyance of goods:—*Held*, that s. 6 applies only to contracts the provisions of which are inconsistent with the exemption claimed by the carrier under s. 1.—That the fact of goods being received by a common carrier under a special contract does not deprive him of the protection of the Act, unless the terms of the contract are such as to be inconsistent with the goods having been received by him in his capacity of a common carrier.—That by the terms of the bill of lading there was a contract to carry by sea from Rotterdam, touching at Harwich, to London, or to carry by sea from Rotterdam to Harwich, and on land by railway from Harwich to London; that the contract was divisible, and the terms as to the land carriage were not inconsistent with the defendants being subject to all the liabilities of common carriers, except those expressly excepted; and the defendants were therefore also entitled to the protec-

DECLARATION OF VALUE OF GOODS—*continued.*
tion given by the statue to common carriers. That the plea was therefore good, and proved.—*Held*, also, that the defendants could not avail themselves of the proviso in s. 7 of the Railway and Canal Traffic Act, which provides that no special contract between a railway company and any other party as to the forwarding of goods shall be binding upon such party unless signed by him or by the person delivering the goods. Baxendale *v.* The Great Eastern Railway Co. **Ex. Ch. 244**

DEED: *See* Creditors' Deed.

DEED OF MORTGAGE:
See Mortgage not Executed by Mortgagee.
Power of Sale.

DEFAMATION: *See* Libel.

DELAYING CREDITORS—*Bankrupt—Bill of Sale of Trader's Goods—Act of Bankruptcy by Trader*—24 & 25 *Vict. c.* 134, *s.* 73.] Under s. 73 of 24 & 25 Vict. c. 134, if an execution for a debt exceeding 50*l.* be levied by seizure and sale of any of the goods of a trader, he is to be deemed to have committed an act of bankruptcy from the date of the seizure; and if within fourteen days from the date of the sale he is adjudged a bankrupt, the proceeds of the sale are to be paid to the assignees under the bankruptcy.—An execution was levied by seizure on the goods of a trader, and he, having already ceased to carry on his trade, in consideration of the judgment creditor withdrawing the execution, assigned to the creditor the goods, &c., which had been seized, being in effect the whole of his property. On these facts, the jury having found the assignment was bonâ fide, and executed to save expense, and to make the most of the property:—*Held* (affirming the judgment of the Queen's Bench), that, as the creditors at large could have interfered and taken the proceeds of the execution under s. 73, there was no sufficient equivalent for the assignment to the execution creditor, which was therefore void and an act of bankruptcy. Woodhouse *v.* Murray **Ex. Ch. 27**

DEPOSIT—Action to recover—Arbitration **214**
See Jurisdiction of Referee.

DEVIATION—Marine insurance - - - **523**
See "Port or Ports of Loading."

DISCHARGE — Prisoner — Contempt of court — Liability of gaoler - - - **486**
See Gaoler.

DISCHARGE, ORDER OF: *See* Order of Discharge

DISHONOUR, NOTICE OF: *See* Notice of Dishonour.

DISQUALIFICATION FOR TOWN COUNCILLOR—*Municipal Borough*—"*Regular Minister of a Dissenting Congregation*"—5 *& 6 Wm.* 4, *c.* 76, *s.* 28.] On a motion for a quo warranto information against a town councillor of a borough, on the ground that he was disqualified at the election in November, 1868, by 5 & 6 Wm. 4, c. 76, s. 28, as being "the regular minister of a dissenting congregation," it appeared that the defendant carried on business in the borough, and was a deacon of the Baptist church there, and he had been invited in September, 1867, by the members of an Independent chapel, in a village about ten miles from the borough, to be their minister, which invitation he refused; but he subsequently agreed to preach

DISQUALIFICATION OF TOWN COUNCILLOR—*continued.*
for them every Sunday, from the 25th of March to the 24th of June, 1868, and at the end of this time further agreed to continue to preach till the end of the year 1868:—*Held*, that the defendant was not "the regular minister of a dissenting congregation" within s. 28; and was therefore not disqualified as town councillor. The Queen *v.* Oldham **290**

DIVISIBILITY OF CONTRACT—Railway - **244**
See Declaration of Value.

"DWELLING PLACE OR SHOP"—*Markets and Fairs Clauses Act*, 1847 (10 *Vict. c.* 14), *s.* 13—*Exposing Goods for Sale.*] By s. 13 of the Markets and Fairs Clauses Act, 1847, after the market-place is opened for public use, every person, other than a licensed hawker, who shall sell, or expose for sale, in any place within the prescribed limits, except in his own dwelling place or shop, any articles in respect of which tolls are authorized to be taken in the market, is made liable to a penalty not exceeding 40*s.*—The appellant was the tenant of a dwelling house and shop, and a piece of ground in front of the shop, in the town of B.; there was a wooden shed affixed to the house, and supported on wooden posts, which had been erected over the piece of ground for eighteen years; and previous to the erection of the shed stone flags had been built into, and formed part of, the house, which projected three feet from the house, and these flags helped to support the wooden shed.—The appellant, after a market had been opened for the town, exposed potatoes and other vegetables for sale outside his house and shop, upon the piece of ground and beneath the wooden shed, and was convicted by justices on an information charging that he had contravened the above section. On a case stating the above facts:—*Held*, by Cockburn, C.J., and Lush and Hayes, JJ. (Mellor, J., dissenting), that the facts shewed that the shed was part of the appellant's dwelling place or shop, and the justices were wrong in convicting him. Ashworth *v.* Heyworth - - - - **316**

ECCLESIASTICAL COURT—Prohibition—Faculty **407**
See Prohibition to Ecclesiastical Court.

EJECTMENT—County court jurisdiction — Value of tenements - - - **4**
See County Court Jurisdiction.

ELECTION—Guardians of the poor—Personation
See Personation. [**147**
—— Parliament—Bribery - - - **626**
See Bribery.

ELECTION OF CORONER—Sheriff's declaration
See Coroner. [**549**

ELECTION OF TOWN COUNCILLOR—*Municipal Corporation—Voting Papers—Misnomer—Initials instead of Christian Names*—5 *& 6 Wm.* 4, *c.* 76, *ss.* 32, 142.] By 5 & 6 Wm. 4, c. 76, s. 32, at the election of councillors of a borough, each burgess may vote by delivering a voting paper containing the christian names and surnames of the persons for whom he votes, with their respective places of abode and descriptions; by s. 142, no misnomer or inaccurate description of any person . . . in any voting paper . . . shall hinder the full operation of the Act with respect to such person . . . pro-

ELECTION OF TOWN COUNCILLOR—*continued.*
vided that the description of such person . . . be such as to be commonly understood.—In the nomination papers, under 22 Vict. c. 35, ss. 6, 7, a candidate was rightly nominated as William Penford, and the names were so published by the town clerk. There was no other person of the name of Penford qualified in the borough. In some of the voting papers the candidate voted for was inserted as W. Penford :—*Held*, that the initial W. instead of William, was a misnomer cured by s. 142; and the voting papers were therefore valid. The Queen *v.* Plenty - - - - 346

ENGINE HOUSE—Rateability—Beneficial occupation - - - - 15
See Beneficial Occupation.

ENTRY—Copyright register—"Person deeming himself aggrieved" - - 715
See Fine Art Copyright.

EQUITABLE PLEA—Bond—Assignment—Action
See Assignment of Bond. [44

—— Companies Act, 1862—Voluntary winding up
See Companies Act, 1862. [462

ESCAPE—*Debtor and Creditor—Sheriff—Certificate of Registration of Deed—A running Bill of Exchange a debt barred by Deed under Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *ss.* 192, 197, 198.] B. executed a deed of composition under the Bankruptcy Act, 1861, containing a release by the creditors, which was registered immediately; at this time a bill drawn by C. and accepted by B. was running. The bill was indorsed to the plaintiff after it became due; the plaintiff sued B. on the bill and obtained judgment against him, and the sheriff, having arrested B. on a ca. sa., discharged him on the production of the certificate of registration of the deed. The plaintiff having brought an action against the sheriff for an escape, the sheriff pleaded the certificate as a justification, to which the plaintiff replied that the plaintiff's cause of action accrued after the registration of the deed, and the plaintiff was not a creditor bound by the deed; on issue joined:—*Held*, that the plaintiff's debt was barred by the deed, and the certificate therefore was a justification to the sheriff in discharging B.—*Quære*, if the pleadings had raised the question, whether the certificate protected the sheriff: as B. having had an opportunity of pleading the deed, could not avail himself of the certificate as a protection. Dignam *v.* Baily - 376

ESTOPPEL—Mortgage not executed by mortgagee—Attornment—Construction - 293
See Mortgage not executed by Mortgagee.

EVIDENCE—Admissibility—Slander of title 730
See Slander of Title.

—— Declaration against interest—Settlement by renting tenement—Presumption - 341
See Declaration against Interest.

—— Malice—Libel—Privileged communication
See Privileged Communication. [262

—— Onus probandi—Negligence—Railway company - - - - - 693
See Onus Probandi.

—— Payment of rent—Presumption—Declaration against interest - - - 341
See Declaration against Interest.

EXPOSING GOODS FOR SALE—"Dwelling place or shop"—Markets, &c., Clauses Act, 1847 - - - - - 316
See Markets, &c., Clauses Act, 1847.

"FACTORY"—Factory Acts Extension Act, 1867, s. 3 - - - - - 209
See Factory Acts Extension Act, 1867.

FACTORY ACTS EXTENSION ACT, 1867 (30 & 31 *Vict. c.* 103), *s.* 3, *subs.* 5, 7—"*Factory*"—"*Making of an Article.*"] By 30 & 31 Vict. c. 103, s. 3, "factory" shall mean . . . 5, "any premises in which steam, water, or other mechanical power is used for moving machinery employed . . . (b), in the manufacture of any article of metal not being machinery."—A company carried on very large works, comprising the business of blast furnaces, iron rolling mills, engine building, and iron shipbuilding, in all its branches. The whole of the several branches communicated, and were open from one end to the other, and were within one common boundary. A boy was employed as a rivet-boy, and in the department where he worked steam machinery was in use for cutting and shaping iron plates, and rivets were heated there; both the plates and rivets were used in the manufacture of a ship. The company having been convicted of having employed the boy in a "factory" beyond the statutable number of hours :—*Held*, that the department in which the boy was employed was a "factory" within the above definition; and that the conviction was therefore right. —*Semble*, that a ship is not "an article" within the meaning of s. 3, subs. 7, which defines "factory" as "any premises in which fifty or more persons are employed in any manufacturing process," "manufacturing process" being defined as "any manual labour incidental to the making of any article or part of an article." Palmer's Shipbuilding, &c., Company *v.* Chaytor - 209

FACULTY — Consecrated ground — Secular purposes - - - - - 407
See Prohibition to Ecclesiastical Court.

FANCY BREAD—Sale otherwise than by weight
See Bread. 1, 2. [559, 565

FINE ART COPYRIGHT — *Expunging Entry of Memorandum of Copyright* — "*Person deeming himself aggrieved*" — *Entry of Memorandum of Copyright and subsequent Assignments—Copyright in Photograph—5 & 6 Vict. c.* 45, *ss.* 1 & 4; 25 & 26 *Vict. c.* 68, *s.* 1.] By 25 & 26 Vict. c. 68, s. 1, "the author of every original painting, drawing, and photograph, and his assigns," shall have the exclusive copyright for the life of the author, and seven years after his death; by s. 4, a register of proprietors of copyright is to be kept, "wherein shall be entered a memorandum of every copyright to which any person shall be entitled under this Act, and also of every subsequent assignment of any such copyright," with certain particulars, "and no proprietor of any such copyright shall be entitled to the benefit of this Act until such registration":—*Held*, that a person to whom the copyright in a picture has been assigned by the author, of which assignment a memorandum has been duly registered, has a good title under the Act, although the original copyright of the author has not been registered:—*Held*, also, that the Act

FINE ART COPYRIGHT—*continued.*
gave a copyright in a photograph of an engraving from a picture.—By 5 & 6 Vict. c. 45, s. 14, and 25 & 26 Vict. c. 68, s. 5, "if any person shall deem himself aggrieved" by any entry in the register, he may apply to one of the superior courts for an order that such entry may be expunged or varied.—W. being charged under the Acts, on the complaint of G., with the infringement of G.'s copyright in a picture, a certified copy of the entry in the register of the assignment to G. was given in evidence, under the Acts, to prove G.'s title. W. having been convicted, applied to the Court to expunge the entry, on the ground that G. had not a good title to the copyright; W. did not set up any title in himself.—*Held*, that W. was not "a person aggrieved" within the meaning of the statutes. In the Matter of the Copyright Acts, 5 & 6 Vict. c. 45; 25 & 26 Vict. c. 68. Graves' Case - - - - - - 715

FOREIGN COURT—Decree—Money paid—Perils of the seas - - - - 414
See Warranty of Nationality.

FRAUDULENT PREFERENCE—*Bankrupt — Relation of Title of Assignees — Money had and received.*] In July, J., being indebted to the defendant in between 200*l.* and 300*l.*, and to other creditors in about 170*l.*, voluntarily gave the defendant a bill of sale of all his goods, stock in trade, &c., with a power to enter and sell if the amount owing were not paid on demand. In October the defendant entered and sold the goods, realizing less than the debt. In November, J. was adjudged a bankrupt on his own petition; and the plaintiff, having been appointed creditors' assignee, sued the defendant for the conversion, and for money had and received:—*Held*, that, as the adjudication was on the bankrupt's own petition, and there was therefore no relation back so as to make the bill of sale an act of bankruptcy, the goods were the defendant's own when he sold them, and an action would not lie for the conversion, nor could the proceeds be money had and received to the use of the plaintiff. Marks *v.* Feldman - 481

FRENCH BREAD—Sale otherwise than by weight *See* Bread. 1, 2. [559, 565

FRIENDLY SOCIETY—*Enforcing Rules — Trade Union—Illegality*—18 & 19 *Vict. c.* 63, *ss.* 9, 24, 44.] Information under ss. 24 and 44 of 18 & 19 Vict. c. 63, against an officer of a friendly society at Bradford, charging him with having misappropriated 40*l.* of the money of the society.—Most of the rules of the society were legitimate rules of a friendly society; but rule 18, s. 6, was: "Any officer being discharged from employment for holding office, if he sign the vacant book each day, shall be paid at the rate of wages he was receiving when discharged, such remuneration to continue till he receive employment." Sect. 7: "Any free or non-free member or members leaving his or their employment under circumstances satisfactory to the branch or executive council shall be entitled to the sum of 15*s.* per week." Sect. 9: "Any member refusing work from private objections, unless he can shew sufficient reason to a committee of a majority of the members at the next branch meeting, shall be suspended from donation until after he has been employed." Rule 25, s. 2: "In

FRIENDLY SOCIETY—*continued.*
the event of an application to the executive committee from other trades for assistance, the general society shall obtain information respecting the same, and on the executive committee being satisfied as to the genuineness of the case, shall grant such assistance as the state of the funds warrants, or the case may, in their opinion, deserve." Rule 31, s. 1: "There shall be an equalization every twelve months (ending with the last meeting night in December) of that portion of the funds of the society which has not been personally invested, such equalization to be in proportion to the number of members in each branch." It was stated in evidence by one of the members: "In case of sickness 12*s.* per week is allowed; when drawn out of shop, or turned off for being member of society, full wages or 15*s.* is allowed. In case of long strike at a particular place, and funds exhausted, the members would not contribute, except annually to an equalization fund. We have monthly reports. Strikes are reported. Members of our society would not be allowed to go to places where there are strikes, if we can prevent them. We would give a member 2*l.* or 3*l.* to send him somewhere else. If he were out of work at Bradford, rather than a man should go to Keighley (if a strike was on), we would grant money to send him a thousand miles another way. We can pay this money at our discretion. We would send men to Halifax or Leeds, pay their railway fares, and keep them on, if it should be a case satisfactory to the branch. The executive council can give money to strikes on any trade. Any sensible man can see from our monthly report where there are strikes, and where to avoid. If I am on strike, or we draw men out, and money is paid to me or them by the society, all such payments are trade privileges, and justified by the rules. Our society has nothing to do with ordering work to be done by the piece."—The justices dismissed the information, on the ground that the rules of the society, as shewn by the evidence, were illegal and in restraint of trade, and that the society was not within 18 & 19 Vict. c. 63, s. 44:—*Held*, by Cockburn, C.J., and Mellor, J., that the evidence shewed that the rules, in practice, are applied so as to render the funds of the society available for the purpose of supporting strikes, by allowing sums of money to workmen wanting employ, in order to prevent them from seeking work in districts where men are on strike, and also by giving assistance to other branch associations in whose districts strikes are going on; that these purposes are not of a friendly society, but of a trade union, and such as are illegal as being in restraint of trade, according to *Hornby* v. *Close* (Law Rep. 2 Q. B. 153), and that the justices were right.—By Hannen and Hayes, JJ., that strikes are not necessarily illegal; and that there was nothing in the evidence to shew that the funds of the society had ever been applied to the support of illegal strikes; that no obligations in restraint of trade were imposed by the rules, and that the society was not shewn to be established for an illegal purpose; and that the decision of the justices was wrong. Farrer *v.* Close - - 602

GAOLER—*Discharge of Prisoner in Custody for Contempt*—11 *Geo.* 4 & 1 *Wm.* 4, *c.* 36, *s.* 15—

GAOLER—*continued.*

Action—Trespass.] M. was committed for a contempt of court in not answering to a bill in chancery. She was taken to gaol under a warrant addressed to the gaoler, which shewed on the face of it the cause of her committal. The plaintiff in the suit did not bring her to the bar of the court within thirty days; but the gaoler did not discharge her:—*Held*, that the duty was cast in express terms on the gaoler by 11 Geo. 4 & 1 Wm. 4, c. 36, s. 15, to discharge the persons in his custody under such circumstances, and as the warrant gave him notice, he was bound to discharge M., after the lapse of thirty days, without an order from the sheriff or the Court of Chancery; and that an action of trespass would lie against him for detaining her. Moone *v.* Rose - 486

GENERAL AVERAGE — Decree of foreign court —Money paid—Jurisdiction - 414
See Warranty of Nationality.

GENERAL DISTRICT RATES — Local Government Act, 1858, ss. 55, 56 - - 163
See Local Government Act, 1858.

GENERAL ORDERS IN BANKRUPTCY, 1861, rule 44 - - - - 143
See Order of Release.

GLOSTER, STATUTE OF - - - 330
See County Courts Act, 1867.

GOVERNOR OF COLONY—Assent to enactment in governor's favour - - 225
See Lex loci.

GUARDIANS OF THE POOR—Election—Personation - - - - - 147
See Personation.

HIGHWAY—Cattle—Pasturage - - 516
See Cattle on Highway.

—— Subsidence—Negligence - - 138
See Subsidence of Road.

HIGHWAY ACT, 1864, s. 25 - - - 516
See Cattle on Highway.

HOLDING OVER BY SUB-TENANT — *Landlord and Tenant—Measure of Damages.*] A tenant, under a parol agreement, without any stipulation that he shall deliver up possession of the premises at the end of the term, is nevertheless bound at law to deliver up complete possession.—Where, therefore, a tenant, under such an agreement, has underlet a part of the premises, and at the determination of both tenancies the under-tenant holds over against the will of the tenant, the landlord can recover against the tenant as damages the value of the whole premises for the time he is kept out of possession, and the costs of ejecting the under-tenant. Henderson *v.* Squire - 170

HOUSEHOLDER, INHABITANT: *See* Inhabitant Householder.

HUSBAND AND WIFE—Chose in action given to wife during marriage - - 500
See Chose in Action.

ILLEGALITY — Friendly society — Trade union
See Friendly Society. [602

IMMORAL CONSIDERATION — *Pledge — Bailment—"In pari delicto potior est conditio possidentis."*] The plaintiff deposited with the defendant the half of a 50*l.* bank note by way of pledge to secure the payment of money due from the plaintiff to the defendant. The debt was contracted for wine and suppers supplied to the plaintiff by the defendant in a brothel kept by her, to be there consumed in a debauch. The plaintiff having brought an action to recover the half-note:—*Held*, that the maxim, "in pari delicto potior est conditio possidentis," applied; and that as the plaintiff could not recover without shewing the true character of the deposit, and that being on an illegal consideration to which he was himself a party, he was precluded from obtaining the assistance of the law to recover it back. Taylor *v.* Chester - - - 309

INCLOSURE ACTS — *Costs of Trial of an Issue under* 8 *&* 9 *Vict. c.* 118, *s.* 56—"*Costs to abide the event of the Trial.*"] The defendant had rights of pasture awarded to him by the valuer, under 8 & 9 Vict. c. 118, in respect of 198 acres of land, and this award was confirmed by the assistant commissioner. The plaintiff appealed against this decision, under s. 56, and brought an action on an issue, in which the plaintiff affirmed and the defendant denied that the decision of the commissioner was erroneous so far as it confirmed the allowance of the claims of the defendant to rights of pasture in respect of the 199 acres. At the trial of the issue, the plaintiff called witnesses to disprove that the defendant had rights of common in respect of any of the 198 acres; and the defendant gave evidence that he was entitled to rights of common in respect of the whole of the 198 acres. A verdict was returned for the plaintiff in respect of part of the 198 acres, and for the defendant in respect of the residue; the value of the rights thus disallowed and allowed being about equal.—By 8 & 9 Vict. c. 118, s. 56, after verdict and final judgment, "the commissioners shall act in conformity thereto, and allow or disallow the claim thereby determined according to the event of such trial; and the costs attending such trial shall abide the event of the trial:"—*Held*, that "event of the trial" did not mean "event" as if it were an ordinary action; and that the plaintiff was not entitled to the general costs of the cause, but each party was entitled to the costs of that part of the issue on which he had succeeded. Hardy *v.* Fetherstonhaugh - 725

INEQUALITY—Creditors' deed - - 49
See Unreasonableness of Creditors' Deed.

INFANT—Ratification of contract under 9 Geo. 4, c. 14, s. 5 - - - - 1
See Ratification by Infant.

INHABITANT HOUSEHOLDER — *Municipal Corporation Act* (5 *&* 6 *Wm.* 4, *c.* 76), *s.* 9—*Burgess List—Joint Occupation.*] A. occupied a house in Exeter jointly with his partner, and carried on his business there. He had the exclusive use of a furnished bedroom and sitting room. He resided more than seven miles from Exeter. He visited Exeter every day except Sundays, to attend to his business, which he always transacted at this house, and he sometimes took his meals there. His affidavit stated that he "some-

INHABITANT HOUSEHOLDER—*continued.*

times" slept there:—*Held*, that a joint occupation is a sufficient occupation under s. 9 of the Municipal Corporation Act to entitle a man to be placed on the list of burgesses; but, *held*, that A. did not inhabit the house in Exeter so as to constitute him an inhabitant householder under that section. The Queen *v.* The Mayor of Exeter. Dipstale's Case - - - 114

2. —— *Municipal Corporation Act* (5 & 6 *Wm.* 4, *c.* 76), *s.* 9—*Burgess List—Practice.*] A., after carrying on business and residing at Exeter for many years, went to live in London. He continued his business, which compelled him often to visit Exeter, and he kept some offices and rooms there. He was in Exeter about twenty times since Michaelmas, 1867, staying each time from four to ten days. On these occasions he always transacted his business, slept and took some of his meals in his own rooms:—*Held*, that the question whether a person is an inhabitant householder within s. 9 of the Municipal Corporation Act is a question of fact, and depends upon whether there has been such a degree of inhabitance as to be in substance and in common sense a residence, and that A. was an inhabitant householder in Exeter, as there was sufficient evidence to shew that he had a residence there as well as in London.—A., having been struck off the burgess list of a borough on objection at the revision, obtained a rule calling on the mayor to shew cause why a mandamus should not issue commanding him to admit A. to the office of burgess of the borough. The rule was directed to the mayor only, and he did not appear to shew cause:—*Held*, that the burgess on whose objection A.'s name had been struck off had a locus standi, and might be heard to shew cause. The Queen *v.* The Mayor of Exeter. Wescomb's Case 110

INITIALS—Voting papers—Misnomer—Election of town councillor—Municipal corporation - - - - - - 346
See Election of Town Councillor.

INJURY TO LAND—Lands Clauses Act, 1845—Obstruction to public right - 358
See Obstruction to Public Right.

—— Lands Clauses Act, 1845—Mandamus—Award - - - - - 320
See Mandamus to take up Award.

INSURANCE: *See* Life Insurance.
Marine Insurance.

INTEREST—Declaration against interest—Evidence - - - - - 341
See Declaration against Interest.

IRISH BANKRUPTCY ACT (20 & 21 *Vict. c.* 60), *ss.* 143–148—*Bankrupt—Effect of Certificate of Conformity or Order of Discharge—Costs barred, though Verdict and Judgment after Bankruptcy.*] An action was commenced on the 2nd of October in England for a debt contracted there. On the 20th of November the defendant was adjudged bankrupt by the Irish Court of Bankruptcy in Dublin. On the 10th of December the plaintiff obtained a verdict. On the 8th of January the costs were taxed, and judgment having been signed, a ca. sa. issued for the debt and costs.

IRISH BANKRUPTCY ACT—*continued.*

On the 12th of January the defendant passed his last examination, and obtained a certificate of conformity, under 20 & 21 Vict. c. 60, ss. 142, 143, sch. (O), which was duly signed on the same day, but remained in court, one month being allowed for any creditor to appear against its being granted. On the 13th of January the defendant was arrested in London under the ca. sa.:—*Held*, that the certificate of conformity took effect from its date; that it discharged the defendant, not only from the plaintiff's debt, but from the costs also as incident thereto, although they were not proveable under the bankruptcy; and that the defendant was therefore entitled to be immediately discharged out of custody.—*Maughan* v. *Vinesberg* (Law Rep. 3 C. P. 318) dissented from. Simpson *v.* Mirabita - - - 257

IRON MINES—*Poor-rate—Rateability—*43 *Eliz. c.* 2, *s.* 1.] Iron mines are not rateable to the poor-rate under 43 Eliz. c. 2, s. 1, coal mines being the only mines mentioned in the statute. Crawshay *v.* Morgan - - Ex. Ch. 581

IRREMOVEABILITY OF PAUPER — *Poor — "Union"—4 & 5 Wm. 4, c. 76, s. 109—24 & 25 Vict. c. 55, ss. 1, 12.*] By 9 & 10 Vict. c. 66, s. 1, no person shall be removed from any parish in which he shall have resided for five years. By 24 & 25 Vict. c. 55, s. 1, and 28 & 29 Vict. c. 79, s. 8, residence in any part of a union is to have the same effect as a residence in a parish, and the period of residence is reduced to one year.—By s. 12 of 24 & 25 Vict. c. 55, the words used in that Act are to be construed as in 4 & 5 Wm. 4, c. 76; and by s. 109 of the latter Act "union" is to include, amongst others, "any number of parishes incorporated for the relief or maintenance of the poor under any local Act.'—By a local Act certain townships, each separately maintaining its own poor, and several parishes were incorporated into a united district for the purpose of maintaining a house of industry for the poor of the whole district, under a board of directors. Each parish or township had the separate care of, and paid for the maintenance of, its own poor in the house, under the management of the directors; but each contributed according to a fixed proportion to the general costs of the maintenance of the house. The outdoor relief was left in the hands of the parish officers:—*Held*, that the united district was a union within the meaning of 24 & 25 Vict. c. 55, s. 1, and 5 & 6 Wm. 4, c. 76, s. 109; and that an aggregate residence of one year in two of the townships rendered a pauper irremoveable. The Machynlleth Union *v.* The Overseers of the Parish of Pool - 592

ISSUE—Costs under 8 & 9 Vict. c. 118, s. 56 725
See Inclosure Acts.

JOINT OCCUPATION — Municipal corporation—Inhabitant householder — Burgess list
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JOINT-STOCK COMPANY: *See* Company.

JUDGE—Sheriff's Court—30 & 31 Vict. c. 142, s. 35 - - - - - 394
See Jurisdiction of Central Criminal Court.

JUDGE'S ORDER — Appointment of umpire — Companies Act, 1862 - - 462
See Companies Act, 1862.

JURISDICTION—Local Court—Wreck - 414
See Warrant of Nationality.

JURISDICTION OF CENTRAL CRIMINAL COURT—4 & 5 *Wm.* 4, *c.* 36, *ss.* 1 & 2—*Judge of Sheriff's Court*—30 & 31 *Vict. c.* 142, *s.* 35.] A verdict and judgment having been given against the defendant on an indictment in the Central Criminal Court, error was brought on the following grounds:—1. That two commissioners being necessary under 4 & 5 Wm. 4, c. 36, to constitute the Central Criminal Court a court for the trial of an indictment, an alderman sat for this purpose with the judge of the Sheriff's Court who tried the indictment, and the trial having lasted several days, a different alderman was substituted in the course of the trial; whereas the Court should have consisted of the same two commissioners throughout the trial. 2. That the trial took place in a second Court, while the general sessions were being held before other justices in their ordinary place of sitting; whereas by 4 & 5 Wm. 4, c. 36, a single Court only is established and authorized to be held. 3. That in consequence of the changes which had been made by different statutes in the jurisdiction of the Sheriff's Court, the judge of that court who presided at the trial as judge had ceased to be a commissioner under 4 & 5 Wm. 4, c. 36, and was therefore incompetent to act as a judge under the commission of oyer and terminer in the trial of this indictment:—*Held*, that none of the grounds of error were tenable. Leverson *v.* The Queen - - - - 394

JURISDICTION OF COUNTY COURT—Ejectment —"Value of tenements" - 4
See County Court Jurisdiction.

JURISDICTION OF QUEEN'S BENCH—Writ of restitution - - - - 371
See Writ of Restitution.

JURISDICTION OF REFEREE—*Arbitrator, decision of, when final—Boat Race—Action to Recover Deposit.*] The plaintiff deposited a stake with the defendant with a view to a race between the plaintiff and K., upon the terms "that the race was to be a right-away sculler's race, and the decision of the referee to be final." In such races, the start is made by the men themselves, but if they fail to start through default of either or both, the referee has power to interfere. There was a default in the start, and the referee, who was stationed at some distance from the starting post, ordered that K. should inform the plaintiff that if he did not start, K. was to row over the course without him. K. rowed over the course without having communicated this order to the plaintiff, or given him any opportunity of starting, and the referee, without inquiry or communication with the plaintiff, ordered the stakes to be paid to K. An action having been brought by the plaintiff to recover his deposit:—*Held*, that as the order of the referee was conditional on its being communicated to the plaintiff, the order not having been communicated, there never was such a start or race as was contemplated; the referee's jurisdiction to award the stakes, therefore, did not attach, and his decision was not final; and that

JURISDICTION OF REFEREE—*continued.*
the plaintiff was entitled to recover. Sadler *v.* Smith - - - - - - 214

JUSTICE—Vexatious Indictments Act — Recognizance of prosecutor - - 573
See Vexatious Indictments Act.

LAND—Injury—Lands Clauses Act, 1845—Obstruction to public right - - 358
See Obstruction to Public Right.

—— Sale—Measure of damages on breach of contract - - - - - 659
See Refusal of Vendor to give Possession.

LANDLORD AND TENANT — Covenant not to assign—Licence - - - 634
See Covenant not to Assign.

—— Holding over by sub-tenant—Measure of damages - - - - 170
See Holding over by Sub-tenant.

—— Mortgage not executed by mortgagee—Estoppel—Construction - - 293
See Mortgage not executed by Mortgagee.

LANDS CLAUSES ACT, 1845, ss, 25, 35, 68 320
See Mandamus to take up Award.

——, s. 68 - - - - - - 358
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——, s. 121 - - - - - 190
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LAW—Assignment by compulsion - 180
See Covenant not to Build.

LEX FORI—Limitations, Statute of - 653
See Limitations, Statute of.

—— Right of action in England for tort committed in a colony - - - 225
See Lex loci.

LEX LOCI—*Lex fori—Comitas gentium extended to Colonies—Right of Action in England for acts in Foreign Country—Effect in England of Act of Indemnity by Colony—Governor of Colony can give a Legal Assent to a Legislative Enactment in his own favour.*] In bar to an action for assault for false imprisonment of the plaintiff in the island of Jamaica, the defendant pleaded that since the grievances complained of, an Act of Indemnity had been passed by the legislature of Jamaica and assented to by the Crown; which enacted that all personal actions, suits, indictments, prosecutions, and proceedings, present or future, against any persons for acts done in good faith, after the proclamation of martial law, in the suppression of a rebellion which had broken out in the island, should be discharged and made void, and that any person by whom such acts had been done should be acquitted and indemnified against the Queen and all other persons; and that the defendant, the governor of the island, and all acting under his authority, were indemnified in respect of all acts done in order to put an end to the rebellion, and such acts were made and declared to be lawful. That the grievances complained of were acts done within the indemnity of the Act.—The plaintiff replied, that the defendant, at the time of the passing of the Act, was the governor of Jamaica and was a necessary party to the passing of the Act, and the Act could not have become the law of Jamaica without defend-

LEX LOCI—*continued.*
ant's assent as governor. On demurrers to the plea and replication:—*Held*, that local legislatures having been established in the English colonies, with plenary powers of legislation, the comity which obtains among nations should be extended to them by the tribunals of this country, when the law of the colony conflicts with the law of England, in respect of acts done within the jurisdiction of the colony. That where the right of action, in respect of an act otherwise wrongful, is taken away, before an action has been brought in this country, by a law binding where such act was done, no action can be maintained in this country. That the plea was therefore good.—*Held*, also, that the governor of a colony could legally give his official assent to a legislative measure in which he is personally interested; and that the replication was therefore bad. Phillips *v.* Eyre 225

LIABILITY—Contingency—Bankruptcy—Proof
See Contingency. [568

LIBEL—Privileged communication—Evidence of malice - - - - 262
See Privileged Communication.

—— Privileged publication — Debate in parliament - - - - 73
See Privileged Publication.

LICENCE—Landlord and tenant—Covenant not to assign - - - - 634
See Covenant not to Assign.

LIEN ON DAMAGES FOR COSTS—*Attorney—Compromise of Action without Attorney's Knowledge.*] The plaintiff recovered a verdict for 25*l.* against the defendant for personal injuries caused by the negligence of the defendant's servants. The plaintiff's attorney informed the defendant's attorney that he had a large claim against the plaintiff for costs, and had a lien for the same upon the damages recovered in the action. Subsequently, a rule nisi for a new trial was granted on the ground that the verdict was against evidence. The plaintiff and defendant, without the knowledge of their respective attorneys, settled the action, the defendant paying 10*l.* to the plaintiff, who was in great poverty, in discharge of all claims for damages and costs:—*Held*, on an application by the plaintiff's attorney that his costs should be paid by the defendant, that the plaintiff's attorney was not entitled to compel the defendant to pay his costs, as the result of the proceedings was doubtful at the time of the settlement, and there was, therefore, no existing fund or security upon which any lien for the attorney's costs had attached, and as the settlement was not shewn to be fraudulent. *In re* Sullivan *v.* Pearson. *Ex parte* Morrison - - - 153

LIFE INSURANCE—Omission of name of person interested - - - - 622
See Omission of Name.

LIMITATIONS, STATUTE OF (21 *Jac.* 1, *c.* 16)—*Lex fori — Plea of Statute of Limitations and Judgment thereon in country of contract no bar to action in England — Attorney's Bill, Action on.*] The plaintiffs, attorneys in the Isle of Man, were retained by the defendant, in 1858, to conduct a suit in one of the Manx courts in which he was defendant. The suit was dismissed in April, 1861; in September, 1861, the plaintiff in the suit appealed to a superior court, and the plaintiffs continued to act for the defendant and conducted the appeal on his behalf up to the 1st of October, 1862. By the Manx statute law an action on simple contract brought in the temporal courts of the island must be commenced within three years of the cause of action. The plaintiffs brought an action in one of the Manx courts more than three years after October, 1862, and the court decided that the action was barred by the statute. The plaintiffs commenced an action in this country in January, 1868, to which the defendant pleaded—1. The judgment of the Manx court. 2. The English statute of limitations:—*Held*, 1. That, as the Manx statute barred the remedy only and did not extinguish the debt, the judgment of the Manx court was no bar. 2. That, under the circumstances, there was a continuous employment of the plaintiffs; and that therefore none of the items were barred by the statute of limitations. Harris *v.* Quine - - - - 653

LIST OF BURGESSES — Inhabitant householder —Municipal corporation 110, 114
See Inhabitant Householder. 1, 2.

LLOYD'S BONDS—Assignment—Action—Equitable plea and replication - - 44
See Assignment of Bond.

LOCAL GOVERNMENT ACT, 1858 (21 *&* 22 *Vict. c.* 98), *ss.* 12 *and* 14 — *Adoption of the Act — Place which includes in its Limits any less Place.*] By s. 14 of the Local Government Act, 1858, "in cases where any place authorized to adopt this Act includes within its limits any less place which, if it were not so included, would of itself be authorized to adopt this Act, such less place shall not be entitled to adopt this Act unless the greater place within the limits of which it is included has refused to adopt the same," or unless it has been determined by one of the principal secretaries of state, under s. 17, that such less place ought, as respects the adoption of this Act, to be excluded from the limits of such greater place.—The parish of L., containing 1400 acres, comprises within its area the corporate borough of L., which is in extent 100 acres. The parliamentary borough of L. comprises the whole of the parish of L., and part of another parish. The majority of the ratepayers of the parish of L. adopted the Act, and an appeal by some of the ratepayers was made to the Secretary of State under s. 17, who dismissed the appeal, and confirmed the adoption of the Act throughout the parish:—*Held*, that the parliamentary borough, including within its limits a less place, viz. the parish, was not a place authorized to adopt the Act; that the parish was a place authorized to adopt the Act, including within its limits a less place, viz., the corporate borough, which, if not so included, would of itself be authorized to adopt the Act; and therefore the adoption by the parish and the order of the Secretary of State were valid. The Queen *v.* Hardy [117

2. —— (21 *&* 22 *Vict. c.* 98), *ss.* 55, 56 — *General District Rates - Union Assessment Committee Act*, 1862 (25 *&* 26 *Vict. c.* 103), *s.* 28.] By s. 55 of the Local Government Act, 1858, the general district rates shall be assessed upon the full net annual value of all property assessable to the

LOCAL GOVERNMENT ACT, 1858—*continued.*
poor-rate ascertained by the poor-rate made next before the making of the assessment; by s. 56, if there is no such assessment for the relief of the poor, or if such assessment is, in the judgment of the local board, an unfit criterion for making a general district rate, the local board may have a valuation made by which the value of the property shall be ascertained. By the Union Assessment Committee Act, 1862, s. 28, in every parish where a valuation list has been approved and delivered to the overseers, no poor-rate, or other rate which by law is required to be based on the poor-rate, shall be of any force, unless the property rated in it be rated according to the value appearing on such valuation list:—*Held*, that general district rates were not "required" to be based on the poor-rate by reason of the option given to the local board by s. 56 of the former Act; and, therefore, that they were not within s. 28 of the latter Act, but might still be based on a valuation made by order of the local board, if in their judgment the poor law valuation list was an unfit criterion for making them. The North Eastern Railway Company *v.* The Local Board of Scarborough - - - - 163

LORD BROUGHAM'S ACT, s. 5 - - 330
See County Courts Act, 1867.

LOSS, TOTAL—Marine insurance—Capture 676
See Capture.

LOSS OF TRADE PROFITS—*Railway Company—Compensation—Lands Clauses Consolidation Act* (8 *Vict. c.* 18), *s.* 121.] In June, 1865, a railway company served on F., a tenant from year to year, the usual notice to treat, and a notice as required by their Act, of their intention at the expiration of six months to enter and take the premises. F. sent in his particulars of claim to the company, but they did nothing further till 1868. F. in the meantime continued to carry on his business of a publican on the premises. In March, 1868, a summons was served by the company on F., and in April the question of the compensation to be paid by the company to F. for his interest in the premises was heard before a metropolitan police magistrate, under s. 121 of the Lands Clauses Consolidation Act. F., inter alia, claimed compensation for the depreciation in the value of such interest, which had taken place in the interval since the expiration of the six months by reason of the execution of the company's works, the custom of the public-house having been greatly reduced by the pulling down of the neighbouring houses taken under the company's statutory powers. The magistrate having refused to assess this item of compensation; on a rule to compel him to do so:—*Held*, that this depreciation was not the subject of compensation, and the claim had been rightly rejected. The Queen *v.* Vaughan and The Metropolitan District Railway Company [190

LUGGAGE—Railway—"Ordinary" or "personal" luggage—Child's plaything - 663
See Passenger's Luggage. 2.

—— Railway—Passenger—Railway and Canal Traffic Act—Conditions limiting liability - - - - 539
See Passenger's Luggage. 1.

"MAKING AN ARTICLE"—Factory Acts Extension Act, 1867, s. 3 - - - 209
See Factory Acts Extension Act, 1867.

MALICE—Libel—Privileged communication—Evidence - - - - 262
See Privileged Communication.

MANDAMUS TO TAKE UP AWARD — *Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *ss.* 25, 35, 68—*Return that the Land was not injuriously affected.*] To a mandamus, reciting that the prosecutor's ferry had been injuriously affected by the works of a railway company, that the parties had proceeded by arbitration under the Lands Clauses Consolidation Act, that the umpire had made his award, and commanding the company to take up the award and furnish a copy to the prosecutor, the defendants returned that the prosecutor's ferry had not been injuriously affected by the defendants' works, within the meaning of the Act, and that the prosecutor was not under the Act entitled to compensation. On demurrer:—*Held*, a good return. The Queen *v.* The Cambrian Railway Company - - - - - 320

MARINE INSURANCE—Capture—Total loss—Deposit of value of goods - - 676
See Capture.

—— "Port or ports of loading"—Concealment—Deviation - - - - 523
See "Port or Ports of Loading."

—— Warranty of nationality—Perils of the seas
See Warranty of Nationality. [414

MARKETS, &c., CLAUSES ACT, 1847—"Dwelling-place or shop"—Exposing goods for sale - - - - 316
See "Dwelling-place or Shop."

MASTER AND SERVANT—Course of employment—Negligent driving - - 476
See Course of Employment.

MAXIMS—In pari delicto potior est conditio possidentis - - - - 309
See Immoral Consideration.

MEASURE OF DAMAGES—Landlord and tenant—Holding over by sub-tenant - 170
See Holding over by Sub-tenant.

—— Sale of real estate—Refusal of vendor to give possession - - - - 659
See Refusal of Vendor to give Possession.

MESNE PROCESS—Arrest—Bail—Recognizance
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METROPOLIS MANAGEMENT ACTS—Subsidence of road - - - - 138
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METROPOLITAN BOARD OF WORKS — Subsidence of road - - - 138
See Subsidence of Road.

MISNOMER—Voting papers—Election of town councillor—Municipal corporation 346
See Election of Town Councillor.

MORTGAGE—Power of sale - - - 97
See Power of Sale.

MORTGAGE NOT EXECUTED BY MORTGAGEE —*Landlord and Tenant—Attornment by Mortgagor as Tenant—Estoppel—Construction of Mortgage Deed.*] B., being mortgagor in possession, executed a mortgage on the 12th of September, 1866

MORTGAGE NOT EXECUTED BY MORTGAGEE —*continued.*
of the premises to the defendants to secure the repayment with interest of certain advances to be made by the defendants. The mortgage was by indenture between B. and the defendants, but was never executed by the defendants; the deed recited the previous mortgage (which was in fee), and by it B. conveyed all the premises comprised in the recited mortgage to the defendants, in fee, upon trust that the defendants should, either immediately or at any time, sell them, "and as a further security for the principal and interest for the time being due from B. to the defendants, B. did thereby attorn and become tenant to the defendants, their heirs and assigns, as and from the date thereof, of such of the premises thereby conveyed as were in his occupation, for and during the term of ten years, if that security should so long continue, at the yearly rent of 800*l.*, to be paid on the 1st of October, the first yearly rent to be payable on the 1st of October then next. Provided that, notwithstanding anything therein contained, and without any notice or demand of possession, it should be lawful for the defendants, their heirs, executors, administrators, or assigns, before or after the execution of the trusts of sale, to enter upon the said mortgaged premises, or any part thereof, and to eject B. or any person claiming through him, and to determine the said term of ten years, notwithstanding any lease that might have been granted by B." The defendants made the stipulated advances, and B. continued in occupation of the premises; and on the 15th of October, 1866, the defendants distrained for the first year's rent:—*Held* (affirming the judgment of the Court of Queen's Bench), that the intention of the parties, as evidenced by the deed, was to create a tenancy at will only, and not a term of ten years; that a deed being therefore unnecessary, the tenancy was created by the assent of the parties and the occupation under it, and that the fact that the defendants had not executed the deed was immaterial. Secondly, that, the parties having agreed that the relation of landlord and tenant should be established between them, the mortgagor was estopped from setting up that the defendants had no legal reversion; and that it made no difference that the fact of the mortgagor having only the equity of redemption appeared on the face of the deed; and that the distress was therefore lawful. Morton *v.* Woods - **Ex. Ch. 293**

MUNICIPAL BOROUGH: *See* Municipal Corporation.

MUNICIPAL CORPORATION—Disqualification for town councillor—Minister of dissenting congregation - - - 290
See Disqualification for Town Councillor.

—— Election of town councillor—Voting papers—Misnomer - - - - 346
See Election of Town Councillor.

—— Inhabitant householder—Burgess list 110,
See Inhabitant Householder. 1, 2. [114

MUNICIPAL ELECTION—Bribery - - 626
See Bribery.

NATIONALITY—Warranty—Marine Insurance—Perils of the seas - - - 414
See Warranty of Nationality.

NEGLIGENCE—Carriers of passengers—Railway company—Roadworthiness of carriages
See Roadworthiness of Carriages. [379

—— Evidence—Onus probandi—Railway company - - - - - 693
See Onus Probandi.

—— Highway—Subsidence - - - 138
See Subsidence of Road.

—— Master and servant—Course of employment—Negligent driving - - 476
See Course of Employment.

—— Telegraph company—Mistake in message
See Telegraph Company. [706

NEGLIGENT DRIVING—Master and servant—Course of employment - - 476
See Course of Employment.

NOTICE—Nuisances Removal Act, 1855, ss. 10, 11, 12 - - - - 122
See Nuisances Removal Act, 1855.

NOTICE OF DISHONOUR—*Bill of Exchange.*] The plaintiff having supplied goods in the way of trade to a company, was about to sue the company, but agreed to take a bill of exchange for the amount accepted by the company, if two of the directors indorsed it. The plaintiff accordingly attended at the office of the company, and a bill was drawn on the company, and accepted on behalf of the company by the manager; and the defendant and another director, both of whom were in the habit of attending at the company's office, put their names to the bill as indorsers. When the bill became due it was not paid, the company being then in progress of being wound up, and the plaintiff, not knowing the defendant's residence, immediately sent a notice of dishonour addressed to the defendant at the office of the company; but the defendant did not receive it till long after, having ceased to attend there on the company becoming embarrassed:—*Held*, that, under the circumstances, the notice of dishonour was good. Berridge *v.* Fitzgerald - - - - - - 639

—— Cheque—Presentment - - - 455
See Presentment of Cheque.

NOTICE FOR HOLDING VESTRY—*District created under Church Building Acts—Sturges Bourne's Act* (58 *Geo.* 3, *c.* 69), *s.* 1.] 58 Geo. 3, c. 69, s. 1, enacts that no vestry or meeting of the inhabitants in vestry for any parish shall be holden until public notice shall have been given of such vestry as therein mentioned:—*Held*, that this section does not apply to parishes, created under the Church Building Acts for ecclesiastical purposes only, and not separately maintaining their own poor. The Queen *v.* Barrow - - - - 577

NOTICE OF OBJECTION—Poor-rate—Union Assessment, &c., Act, 1864 - - 323
See Valuation List.

NUISANCES REMOVAL ACT, 1855 (18 *&* 19 *Vict. c.* 121), *ss.* 10, 11, 12, *Sch. Form* (*C.*)—*Notices necessary to found Jurisdiction under s.* 12—*Sanitary Act*, 1866 (29 *&* 30 *Vict. c.* 90), *s.* 21.] When a nuisance has been ascertained by the local authority to exist on private premises, and a notice has been served under the Sanitary Act, 1866, s. 21, it is not necessary, in order to found proceedings before justices for the abatement, under s. 12 of the Nuisances Removal Act, 1855, that a notice

NUISANCES REMOVAL ACT, 1855—*continued.*
should have been served under s. 11, and Sch. Form (C.) of the latter act. Amys *v.* Creed 122

NUISANCES REMOVAL ACT, 1863 (26 & 27 *Vict. c.* 117), *ss.* 2, 3—*Carcases deposited in any "place" for the purpose of being prepared for Sale as Food of Man.*] By the Nuisances Removal Act, 1863, s. 2, the inspector of nuisances may at all reasonable times inspect "any animal, carcase, &c., exposed for sale, or deposited in any place for the purpose of sale, or of preparation for sale, and intended for the food of man," and if it appear to a justice that it is unfit for food, he may order it to be destroyed; and the person, in whose possession, or on whose premises the carcase was found, is liable to a fine of 20*l.*, or to be imprisoned for a term not exceeding three months, at the discretion of the justice; by s. 3, if any person prevent the inspector "from entering any slaughter-house, shop, building, market, or other place," where such carcase, &c., is kept for sale or preparation for sale, he is liable to a penalty of 5*l.*—Two carcases of cows, unfit for food, were found in a yard at the back of a butcher's house, there being a slaughter-house on one side of the yard:—*Held*, that the yard was a "place" within the meaning of the Act. Young *v.* Grattridge - 166

OBSTRUCTION OF PUBLIC RIGHT — *Lands Clauses Act*, 1845 (8 *Vict. c.* 18), *s.* 68 — *Compensation—Injury to Land.*] The principle of the decision of the House of Lords in *Ricket* v. *Metropolitan Railway Company* (Law Rep. 2 H. L. 175) is, that in order to entitle a claimant to compensation under s. 68 of the Lands Clauses Consolidation Act, 1845, the injury must be done to land or some interest in land, and a mere personal injury, though connected with the enjoyment of particular land, is not ground for compensation. Therefore, where the occupier of premises near the Thames had been used to draw water from the river, and to bring barges to a draw dock, as public rights, and not as rights attached to the premises, and was obstructed in the enjoyment of these rights by the works of the embankment:—*Held*, that he could not claim compensation under s. 68. The Queen *v.* The Metropolitan Board of Works - - - - - - 358

OCCUPATION—Municipal corporation—Inhabitant householder—Burgess list - 114
See Inhabitant Householder. 1.

—— Poor-rate—Sewers, wharf, engine-house, station - - - - - 15
See Beneficial Occupation.

OCCUPATION OF BED OF RIVER—*Poor-rate—Floating Barge—Rateability.*] The corporation of Oxford are the owners of the soil of the bed of the river Isis, which is subject to the control of the conservators of the river Thames, and is a public highway. The University Boat Club are possessed of a barge which is moored to two posts fixed to the soil, by means of two iron rings which are attached to the barge, and pass loosely round the posts so as to allow the barge to rise and fall with the water of the river; and sometimes, when the water is very low, the barge rests on the soil; the barge, though capable of being moved, is never in fact moved from its station. The posts were driven into the soil more than twenty years ago, and have since been so used by the boat club, but

OCCUPATION OF BED OF RIVER—*continued.*
without the licence of the corporation or of any one else. There was no evidence by whom or by whose authority the posts had been first placed, and no rent had ever been paid by any one for their use. The University Boat Club having been assessed to general district rates in respect of these posts and the barge attached:—*Held*, that on these facts there was no proof of occupation, as of right, of the posts by the University Boat Club, and therefore that they were not rateable. Grant *v.* The Local Board of Oxford - - 9

OCCUPATION OF WHARF — *Poor-rate — Rateability—Wharfage Dues.*] The owners of docks and wharves let the wharves to a railway company. The company were the sole occupiers of the wharves, but by the agreement certain wharfage dues payable on all goods shipped or unshipped at the wharves were reserved to the landlords, and were paid direct to them by the owners or consignees of the goods:—*Held*, that the railway company, as sole occupiers of the wharves, were liable to be assessed to the poor-rate in respect of the full rateable value of the premises, including the wharfage dues, without regard to the amount of benefit which they themselves derived from the occupation. The Queen *v.* The Rhymney Railway Company - - - - - 276

"OFFICER"—Arrest of bankrupt—Penalty 649
See Arrest of Bankrupt.

OMISSION OF NAME—*Life Insurance—Person Interested*—14 *Geo.* 3, *c.* 48, *s.* 2.] The plaintiff's wife being entitled under a will to 200*l.* on attaining her majority, the trustees of the will agreed to advance the 200*l.* to the plaintiff on his obtaining a surety for the repayment in the event of the wife dying under twenty-one. A person became surety on condition that insurance was effected on the life of the wife. The 200*l.* was advanced, and an insurance effected by the plaintiff in the name of the wife on her own life:—*Held*, that, as the plaintiff was primarily interested in the policy, it was illegal and void by force of 14 Geo. 3, c. 48, s. 2, which renders it unlawful to make a policy without inserting the names of the persons interested therein. Evans *v.* Bignold - - - 622

ONUS PROBANDI—*Negligence—Evidence—Railway Company.*] In an action for negligence against a railway company, the plaintiff proved that he went to their station for the purpose of travelling by their railway, and made some inquiries respecting the departure of trains, and was directed by a porter of the defendants to look at a time table suspended on a wall under a portico of the station. While there, a plank and a roll of zinc fell through a hole in the roof upon the plaintiff and injured him; and at the same time a man was seen on the roof of the portico. The judge nonsuited the plaintiff:—*Held*, that there was no evidence that would have justified the jury in finding the defendants were guilty of negligence, and that the nonsuit was right. Welfare *v.* The London and Brighton Railway Company 693

ORDER OF DISCHARGE—*Bankrupt—Process—Overseer of Poor—Poor-law Auditor, Proceedings against Overseers*—4 & 5 *Wm.* 4, *c.* 76, *s.* 99—7 & 8 *Vict. c.* 101, *s.* 32.] By 7 & 8 Vict. c. 101, s. 32, the poor-law auditor is to certify on every

ORDER OF DISCHARGE—*continued.*
account audited by him any money found to be due from any person, and such person shall pay over such money to the treasurer of the union within seven days, and if it be not so paid, the auditor is to proceed to enforce the payment of the money, which is to be recoverable in the same manner as penalties may be recovered under 4 & 5 Wm. 4, c. 76. By s. 99 of that Act, all penalties inflicted by the Act for any offence against the same shall, upon conviction of the offence, be levied by distress and sale of the goods of the offender or person liable by warrant of justices, and, in default of sufficient distress, the justices may commit the offender to prison for any time not exceeding three months unless the penalties be sooner paid.—An auditor on the 14th of April certified a balance to be due from the late overseer of a parish, and on the 5th of May laid an information against him for the nonpayment. At the hearing on the 18th of May, the overseer proved an order of discharge dated the 11th of May, on an adjudication of bankruptcy dated the 4th of January, and relied on it as a bar to the proceedings:—*Held*, that the balance was a debt only, and the mode given for enforcing it did not make the nonpayment an offence; and the debt being proveable under the bankruptcy, and therefore barred by the order of discharge, no proceedings could be taken to enforce it.—*Quære*, whether the power of commitment in default of sufficient distress applies to such a case, or only to things which are expressly made "offences." The Queen *v.* Master - - - - - 285

—— Irish Bankruptcy Act—Costs—Proof 257
See Irish Bankruptcy Act.

ORDER OF RELEASE—*Sheriff—Registrar of Bankruptcy Court—Bankruptcy Act*, 1849 (12 & 13 *Vict. c.* 106), *s.* 27—*General Orders in Bankruptcy*, 1861, *Rule* 44.] By the Bankruptcy Act, 1849, s. 27, any registrar of the court of bankruptcy may, during vacation, or during the illness or absence from any other reasonable cause of any commissioner, act as the deputy of such commissioner, with all the power of the court. By rule 44 of the general orders, made under s. 8, except in cases of emergency, the nature whereof shall be entered on the proceedings, no registrar shall sit or act for any commissioner, under s. 27, without the express request in writing of such or some other commissioner.—To an action for an escape, the sheriff pleaded that the debtor had been adjudged a bankrupt with protection while in the defendant's custody, and an order had been made by the registrar of the court of bankruptcy for the release of the debtor, and the defendant thereupon, acting bonâ fide and in obedience to the order, released the debtor. The plaintiff replied that the registrar had not been requested in writing by any commissioner to act for him nor had any emergency arisen, nor the nature thereof been entered on the proceedings. On demurrer:—*Held*, that, assuming the order could be set aside, it was voidable only and not void, and protected the sheriff, on the principle of *Lloyd* v. *Harrison* (Law Rep. 1 Q. B. 502). Hargreaves *v.* Armitage 143

PARLIAMENT—Conspiracy by members of parliament - - - - - 573
See Vexatious Indictments Act.

PARLIAMENT—*continued.*
—— Debate—Privileged publication - 73
See Privileged Publication.

PARLIAMENTARY ELECTION—Bribery - 626
See Bribery.

PAROCHIAL ASSESSMENTS—*Union Assessment Committee Act*, 1862 (25 & 26 *Vict. c.* 103), *ss.* 14, 20, 25.] New houses completely finished and ready for occupation, but not let or occupied at the time of returning the valuation list of a parish, are "rateable" hereditaments within the meaning of the Union Assessment Committee Act, 1862, and ought to be inserted in the list. The Queen *v.* The Overseers of Malden - - 326

PARTICULARS BY DEFENDANT—*Practice—Action for Slander of Title.*] In an action, charging that the defendant falsely and maliciously wrote to and told persons who had bought certain machines of the plaintiffs, that the machines were infringements of his, the defendant's, patents, the defendant having pleaded not guilty, the Court ordered the defendant to deliver particulars, shewing in what parts the plaintiffs' machines were an infringement of the defendant's patents, and pointing out, by reference to the page and line of the defendant's specifications, which part of the inventions therein described he alleged to have been infringed. Wren *v.* Weild - - - 213

PASSENGER'S LUGGAGE—*Railway—Conditions limiting Liability of Carrier—Railway and Canal Traffic Act*, 1854 (17 & 18 *Vict. c.* 31), *ss.* 2 & 7.] The plaintiff took a ticket of the South Eastern Railway Company, to be conveyed as a passenger from London to Paris, on which was printed, "The South Eastern Railway Company is not responsible for loss or detention of or injury to luggage of the passenger travelling by this through ticket, except while the passenger is travelling by the South Eastern Railway Company's trains or boats. . . ." The plaintiff did not sign this memorandum. The plaintiff's portmanteau was lost between Calais and Paris on a French railway:—*Held*, that the Railway and Canal Traffic Act, 1854, only extends to the traffic on a company's own lines, and s. 7 does not apply to a contract exempting a company from liability for loss on a railway not belonging to or worked by the company; and that the company were therefore protected by the condition on the ticket. Zunz *v.* The South Eastern Railway Co. 539

2. —— *Railway—"Ordinary" or "Personal" Luggage—Child's Plaything.*] Those articles only, which travellers usually carry with them as part of their luggage, come within the definition of "ordinary" or "personal" luggage, which a railway company is bound to carry with a passenger free of charge. A railway company refused to carry a "spring horse" for a child to ride on, weighing 78 lbs. and measuring 44 inches in length, tendered to them by a passenger, who was entitled to take with him 112 lbs. weight of "ordinary" or "personal" luggage:—*Held*, that the spring horse was not "ordinary" or "personal" luggage, and that the company were justified in refusing to carry it free of charge. Hudston *v.* The Midland Railway Company - - 366

PAUPER—Irremoveability - - - 592
See Irremoveability of Pauper.

PAYMENT OF RENT—Evidence—Presumption—Declaration against interest - 341
See Declaration against Interest.

PAYMENT OF SPECIAL CONSTABLES—Appointment—Order on treasurer—Practice - - - - - 585
See Special Constables.

PERILS OF THE SEAS—Marine insurance—Warranty of nationality - - 414
See Warranty of Nationality.

"PERSON DEEMING HIMSELF AGGRIEVED"—Entry in register of copyright - 715
See Fine Art Copyright.

"PERSON ENTITLED TO VOTE"—Personation—Election of guardians of poor - 147
See Personation.

"PERSONAL" LUGGAGE—Railway—"Ordinary" or "personal" luggage—Child's plaything - - - - 366
See Passenger's Luggage. 2.

PERSONALTY—Slander of title - - 730
See Slander of Title.

PERSONATION—*Election of Guardians of the Poor—"Person entitled to Vote"*—14 & 15 *Vict.* c. 105, s. 3.] A man cannot be convicted, under 14 & 15 Vict. c. 105, s. 3, of personating "a person entitled to vote" at an election of guardians of the poor, if the person personated be dead at the time. Whiteley *v.* Chappell - - 147

PHOTOGRAPH—Copyright - - - 715
See Fine Art Copyright.

"PLACE"—Nuisances Removal Act, 1863, ss. 2, 3
See Nuisances Removal Act, 1863. [166

PLAYTHING—Railway—"Ordinary" or "personal" luggage - - - 366
See Passenger's Luggage. 2.

PLEADING—Award—Res judicata - 669
See Res judicata.

—— Equitable plea — Bond — Assignment — Action - - - - 44
See Assignment of Bond.

—— Equitable plea—Companies' Act, 1862 462
See Companies Act, 1862.
Voluntary Winding-up.

PLEDGE—Immoral consideration—"In pari delicto potior est conditio possidentis" 309
See Immoral Consideration.

POOR—Election of guardians—Personation 147
See Personation.

—— Irremoveability—"Union" - - 592
See Irremoveability of Pauper.

—— Settlement by renting tenement—Evidence—Presumption—Declaration against interest - - - - 341
See Declaration against Interest.

—— Suspended order of removal—Expenses of maintenance - - - 33
See Suspended Order of Removal.

POOR LAW AUDITOR—Bankrupt—Process—Order of discharge - - - 285
See Order of Discharge.

POOR-RATE—Apportionment—17 Geo. 2, c. 38, s. 12 - - - - - 554
See Apportionment of Poor-rate.

POOR-RATE—*continued.*

—— Beneficial occupation—Sewers, wharf, engine-house, station - - - 75
See Beneficial Occupation.

—— Occupation of bed of river—Floating barge 9
See Occupation of Bed of River.

—— Occupation of wharf—Wharfage dues 276
See Occupation of Wharf.

—— Railway—Contributive value - - 354
See Contributive Value.

—— Rateability—Iron mines - - 581
See Iron Mines.

—— Valuation list—Appeal—Practice - 323
See Valuation List.

"PORT OR PORTS OF LOADING"—*Marine Insurance—Concealment—Deviation.*] The plaintiffs, in 1861, effected with the defendant a policy of insurance on bone and bone ash on board a certain vessel at and from Buenos Ayres and port or ports of loading in the province of Buenos Ayres, to port or ports of call and discharge in the United Kingdom. The plaintiffs knew, at that time, that the vessel was going from Buenos Ayres to L., a port in the province, to complete her cargo; but this fact was not communicated to the defendant, and he did not know that L. was a port in the province. L. was a place where a trade in hides, bone, and bone ashes was carried on between that place and Buenos Ayres; but vessels could not clear from L. to Europe, but had to return to Buenos Ayres to obtain a clearance. L. was unknown, in 1861, to underwriters as a place of loading; and if underwriters, on a policy as above, had been informed that the vessel was going to load there, they would have required a higher premium than the defendant charged. The vessel went from Buenos Ayres to L., but being unable to get cargo, she left to return to Buenos Ayres, and was lost on her way thither:—*Held*, 1. That L. was a port of loading within the policy. 2. That the non-communication that the vessel was going to L. to complete her cargo was not a concealment. 3. That the return of the vessel from L. to Buenos Ayres was not a deviation. Harrower *v.* Hutchinson - - - - - 523

POWER OF SALE—*Mortgage.*] D., a lessee for a long term of years, in 1848 mortgaged the premises to the defendant for the residue of the term minus five days, subject to a proviso for redemption, with a power, in case of default in payment of the principal sum and interest, to sell and dispose of the premises by public sale or private contract for such price as could reasonably be gotten for the same, the receipt of the defendant to be a full discharge to the purchaser. D. made default. On the 12th of May, 1852, there being then a larger sum due to defendant from D., the defendant contracted with P. to sell him the premises for 550*l.*, 50*l.* being paid down; and by indenture of the 15th of May, 1852, between defendant, a trustee, and P., reciting the above agreement, and that it had been agreed that 500*l.* of the purchase money should remain on mortgage of the same premises, the defendant, in pursuance of the agreement, and in pursuance of the power in the mortgage of 1848, assigned to the trustee in trust for sale to pay the 500*l.* and interest, in case P. should

POWER OF SALE—*continued.*
make default, and P. covenanted to pay the purchase-money by yearly instalments of 100*l.* with interest. The defendant credited the whole of the 550*l.* to D.; P. entered and occupied the premises for some time, and having paid 200*l.* on account, made default. In 1859 the defendant and the trustee assigned the property to the plaintiff with a covenant against incumbrances. On the plaintiff attempting to raise money on the premises, it was objected that the power of sale in the original mortgage had not been duly exercised by the contract of sale carried out by the mortgage in 1852; on which the plaintiff sued the defendant on his covenant against incumbrances:—*Held*, that as there was a valid and bonâ fide contract of sale between the defendant and P., the power of sale had been duly exercised, and it was immaterial that the contract of purchase was carried out by a mortgage. Thurlow *v.* Mackeson - - 97

PRACTICE—Bail—Form of recognizance - 149
See Arrest on Mesne Process.

—— Certiorari - - - - 585
See Special Constables.

—— Mandamus to admit to office of burgess—Locus standi - - - 110
See Inhabitant Householder. 2.

—— Mandamus to take up award—Lands Clauses Act, 1845 - - - - 320
See Mandamus to take up Award.

—— Particulars by defendant—Slander of title
See Particulars by Defendant. [213

—— Poor-rate—Valuation list—Appeal—Second rate - - - - - 323
See Valuation List.

—— Security for costs—Insolvent assignee suing for creditors - - - - 590
See Security for Costs.

PREFERENCE, FRAUDULENT: *See* Fraudulent Preference.

PRESENTMENT OF CHEQUE—*Bill of Exchange—Notice of Dishonour.*] A. drew a cheque on H. & Co, bankers at Falmouth, in favour of the defendant on the 4th of June, and the defendant paid it into the bank of the plaintiffs (his bankers) at Truro on the 5th. On the same day the plaintiffs sent the cheque to B. & Co., their agents in London, who received it on the 6th, and on the same day presented it, through the country clearing house, to H. & Co.'s agents in London. On the same day H. & Co.'s agents forwarded the cheque to H. & Co. at Falmouth, who received it on the 7th. On that day H. & Co.'s agents in London failed. On the 7th B. & Co. wrote to H. & Co. to return the cheque or to pay it. On the 8th H. & Co. wrote, declining to do either, and stopped payment on the following day. The plaintiffs gave the defendant notice of dishonour on the 9th:—*Held*, that if the plaintiffs had sent the cheque to an agent at Falmouth, that agent would have been entitled to another day to present the cheque for payment; sending the cheque to London through the clearing house did not take any longer time; and that there had been no delay in the presentment of the cheque. That, as the notice of dishonour was given on the day following that on which the cheque was dishonoured, it was given in due time. And the plaintiffs (who had entered the amount to the defendant's credit) were, therefore, entitled to debit the defendant with the amount of the cheque on its not being paid. Prideaux, P.O., *v.* Criddle - - 455

PRINCIPAL AND AGENT—Property in goods shipped — Consignor and consignee — Bill of lading - 196, Ex. Ch. 493
See Property in Goods Shipped.

PRINCIPAL AND SURETY — Reservation of rights—Composition deed - - 630
See Reservation of Rights against Surety.

PRISONER—Discharge of gaoler—Contempt of court - - - - 486
See Gaoler.

PRIVILEGED COMMUNICATION—*Libel—Malice, Evidence of—Company.*] The plaintiff was employed as manager of the factories of a joint-stock company, and the auditors of the company, in auditing the plaintiff's accounts, appended to their report the following statement:—"The shareholders will observe that there is a charge of 1306*l.* for deficiency of stock, which the manager is responsible for. His accounts have been badly kept, and have been rendered to us very irregularly." The directors submitted their own report, together with that of the auditors, to the ordinary general meeting of the shareholders of the company, according to the usual practice, and it was resolved by the meeting that the reports should be printed and sent to the shareholders. The reports, including the above statement, were accordingly sent to a printer, printed, and circulated among the shareholders, and used at an adjourned meeting of the shareholders. The plaintiff having brought an action for libel against the company:—*Held*, that, as it was the duty of the directors to communicate the report of the auditors to the shareholders, and it was for the interest of all the shareholders to be informed of the report, the printing and publication of the reports were primâ facie privileged; and that there was no evidence of express malice for the jury. Lawless *v.* The Anglo-Egyptian Cotton and Oil Company - - - - 262

—— Debate in parliament - - - 73
See Privileged Publication.

PRIVILEGED PUBLICATION—*Libel—Report of Debate in Parliament—Comments on Matters of public Concern.*] A faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual which had been spoken in the course of the debate, is not actionable at the suit of the person whose character has been called in question. But the publication is privileged on the same principle as an accurate report of proceedings in a court of justice is privileged, viz., that the advantage of publicity to the community at large outweighs any private injury resulting from the publication. The plaintiff presented a petition to the House of Lords, charging a high judicial officer with having, thirty years before, made a statement false to his own knowledge, in order to deceive a committee of the House of Commons, and praying inquiry and the removal of the officer if the charge was found true; a debate ensued on the presentation of the petition, and the

PRIVILEGED PUBLICATION—*continued.*
charge was utterly refuted :—*Held*, that this was a subject of great public concern on which a writer in a public newspaper had full right to comment, and the occasion was therefore so far privileged that the comments would not be actionable so long as a jury should think them honest and made in a fair spirit, and such as were justified by the circumstances as disclosed in an accurate report of the debate. Wason *v.* Walter - - 73

PRIVITY OF CONTRACT—Telegraph company—Mistake in message - - 706
See Telegraph Company.

PROCESS—Bankrupt—Overseer of poor—Order of discharge - - - - 285
See Order of Discharge.

PROCESS, MESNE—Arrest—Bail—Recognizance
See Arrest on Mesne Process. [149

PROFITS—Loss—Compensation—Lands Clauses Act, 1845 - - - - 190
See Loss of Trade Profits.

PROHIBITION—County court jurisdiction 4
See County Court Jurisdiction.

PROHIBITION TO ECCLESIASTICAL COURT—*Faculty to apply Consecrated Ground to Secular Purposes—Prohibition by a Stranger to the Suit.*] The guardians of the poor of a parish, being owners in fee of land, on part of which a parish workhouse had been erected, and another part of which had been consecrated as a burial ground, prayed a faculty in the Consistory Court of London to authorize the erection of a chapel for the inmates of the workhouse, and other buildings connected with the workhouse, on a part of the consecrated ground in which no bodies had been buried. No sentence had been pronounced by the Consistory Court; and B., a stranger to the parish and having no interest in the matter, obtained a rule for a prohibition to prohibit proceedings in the suit. The Court discharged the rule; first, because, although a faculty ought not to be granted to apply consecrated ground to secular purposes, yet a distinction might be made as to the chapel, being an ecclesiastical purpose; and it was not to be presumed that the inferior court would exceed its jurisdiction and grant the faculty for both the purposes prayed. Secondly, because, in the exercise of its discretion, the Court would not interfere at the instance of a stranger. The Queen *v.* Sir Travers Twiss 407

PROOF—Bankruptcy—Contingency—Liability
See Contingency. [568

—— Bankruptcy—Costs—Verdict and judgment after bankruptcy - - - 257
See Irish Bankruptcy Act.

PROOF OF UNLIQUIDATED DAMAGES—*Bankruptcy—Order of Discharge—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 153.] The defendant occupied as tenant to P. a warehouse at a yearly rent, and the plaintiff became his sub-tenant of one of the rooms. The defendant's rent being in arrear, P. lawfully distrained the goods in the warehouse, including goods of the plaintiff. To obtain the release of his goods the plaintiff paid P. 15*l.* After this the defendant was adjudged a bankrupt on his own petition, and obtained his order of discharge. The plaintiff then sued the defendant for the damage he had sustained :—*Held*, that the defendant was not "liable, by reason of any contract or promise, to a demand in the nature of damages" at the suit of the plaintiff, within the meaning of s. 153 of the Bankruptcy Act. 1861; that the plaintiff's claim was therefore not proveable under the bankruptcy and not barred by the order of discharge. Johnson *v.* Skafte - - - - - 700

PROOF OF UNLIQUIDATED DAMAGES—*contd.*

PROPERTY IN GOODS SHIPPED—*Principal and Agent to buy—Consignor and Consignee—Bill of Lading.*] The plaintiff in England sent an order to P. & Co. at Pernambuco, to buy cotton for him within certain limits. They bought cotton on account of the plaintiff, and shipped it in the defendant's vessel; the invoice was made out as shipped on account and risk of the plaintiff, but the bill of lading was taken deliverable to P. & Co.'s order, or assigns, paying freight. P. & Co. wrote to the plaintiff, advising the shipment and price and quality of the cotton, and saying: "Enclosed, please find invoice and bill of lading; we have drawn upon you for the amount in favour of our agents, to which we beg your protection." The invoice was sent direct to the plaintiff, but the bill of lading (which had been indorsed in blank by P. & Co.) was sent with the bill of exchange to P. & Co.'s agents in England. The agents wrote to the plaintiff, enclosing the two documents, and requesting his protection to the draft. The plaintiff retained the bill of lading, but returned the bill of exchange unaccepted on the ground that P. & Co. had not complied with the plaintiff's order. The plaintiff presented the bill of lading to the defendants, but they, having been informed of the circumstances under which the plaintiff held it, refused to deliver the cotton to him, saying they should deliver it to P. & Co.'s agents under a duplicate bill of lading, which the agents had retained. On a case stating the above facts, the Court having power to draw inferences of fact:—*Held* (affirming the judgment of the Court of Queen's Bench), that the inference to be drawn was, that it was the intention of P. & Co. that the property in the cotton should not pass to the plaintiff unless he accepted the bill of exchange: that no property, therefore, passed to the plaintiff, and the defendants were right in refusing to deliver to him.—[So held by Kelly, C.B., Willes and Montague Smith, JJ., and Channell, B.; Cleasby, B., doubting.]—*Quære*, per Channell, B., whether the inference to be drawn would not have been the same if the bill of lading had been forwarded direct to the plaintiff by P. & Co. in their letter, inasmuch as the letter stated that they begged the plaintiff's protection to the draft. Shepherd *v.* Harrison - Ex. Ch. 493; s. c. in Q. B. 196

PROTECTION—Bankruptcy—Arrest—Penalty 649
See Arrest of Bankrupt.

PUBLIC HEALTH ACT, 1848 (11 & 12 *Vict. c.* 63), *ss.* 69, 144—*Compensation to Owner of House Damaged by Raising of Level of Street.*] A local board of health gave notice under 11 & 12 Vict. c. 63, s. 69, to the owner of a house abutting on a street to level and pave it, and in default of the owner, they did the work themselves. By the alteration so caused in the level of the street, the access to the house was rendered difficult and dangerous:—*Held*, that the owner was entitled to compensation under s. 144. The Queen *v.* The Wallasey Local Board of Health - 351

RACE—Jurisdiction of referee—Arbitration 214
See Jurisdiction of Referee.

RAILWAY AND CANAL TRAFFIC ACT, ss. 2 & 7
See Passenger's Luggage. 1. [539

—— s. 7 - - - - - - 244
See Declaration of Value of Goods.

RAILWAY COMPANY—Carriers of passengers—Roadworthiness of carriage - 379
See Roadworthiness of Carriage.

—— Compensation under Lands Clauses Act, 1845—Loss of trade profits - - 190
See Loss of Trade Profits.

—— Evidence—Onus probandi—Negligence 693
See Onus Probandi.

—— Passenger's luggage—Conditions limiting liability—Railway and Canal Traffic Act
See Passenger's Luggage. 1. [539

—— Passenger's luggage—"Ordinary" or "personal" luggage—Child's plaything 366
See Passenger's Luggage. 2.

—— Poor-rate—Contributive value - 354
See Contributive Value.

—— Special Contract—Declaration of value 244
See Declaration of Value of Goods.

RATE; *See* Poor-rate.

RATEABILITY; *See* Poor-rate.

RATES, GENERAL DISTRICT—Local Government Act, 1858 - - - - 163
See Local Government Act, 1858.

RATIFICATION BY INFANT—*Contract*—9 *Geo.* 4, *c.* 14, *s.* 5.] Goods having been supplied by the plaintiff to the defendant whilst he was an infant; when he came of age an account with the items and prices was submitted to him, at the foot of which he signed the following: "Particulars of account to the end of 1867, amounting to 162*l.* 11*s.* 6*d.*, I certify to be correct and satisfactory":—*Held*, that this did not amount to a recognition of the debt as an existing liability so as to be a ratification of the contract within 9 Geo. 4, c. 14, s. 5. Rowe *v.* Hopwood - - - - - - - 1

REAL ESTATE — Sale — Measure of damages on breach of contract - - - 659
See Refusal of Vendor to give Possession.

REASONABLE AND PROBABLE CAUSE—Slander of title - - - - - 730
See Slander of Title.

RECOGNISANCE—Form—Bail - - 149
See Arrest on Mesne Process.

REFUSAL OF VENDOR TO GIVE POSSESSION—*Sale of Real Estate—Measure of Damages for Breach of Contract by Vendor.*] The defendants, mortgagees of a house with a power of sale, sold it by auction to the plaintiff, the particulars of sale stating that possession would be given on completion of the purchase. The plaintiff soon afterwards contracted for a resale at an advance of 105*l.* On investigation the title was satisfactory, but on the plaintiff requiring possession before completing the purchase, it appeared that the mortgagor was in possession and refused to give it up. The defendants were in a position to have ousted him by ejectment, but they refused to complete the sale. On this the plaintiff brought an action for a

REFUSAL OF VENDOR TO GIVE POSSESSION—*continued.*

breach of the contract of sale:—*Held* (affirming the judgment of the Court of Queen's Bench), that, as the breach of contract arose, not from inability of the defendants to make a good title, but from their not having taken the necessary steps to secure the possession, the case did not come within the principle of *Flureau* v. *Thornhill* (2 W. Bl. 1078), and the plaintiff was entitled to recover not only his deposit and the expenses of investigating the title, but also damages for the loss of his bargain; and that the measure of damages was the difference between the contract price and the value at the time of the breach of contract; and that the profit which it was shewn the plaintiff could have made on a resale, uncontradicted by other evidence, was evidence of this enhanced value; and that the plaintiff was therefore entitled to recover the 105*l.* Engell *v.* Fitch - - - - - Ex. Ch. 659

REGISTRAR OF BANKRUPTCY COURT—Order of release - - - - 143
See Order of Release.

"REGULAR MINISTER OF DISSENTING CONGREGATION" - - - 290
See Disqualification of Town Councillor.

REGULÆ GENERALES - - - 739

RELATION BACK—Bankruptcy—Title of assignees—Fraudulent preference - 481
See Fraudulent Preference.

RELEASE, ORDER OF—Sheriff—Bankruptcy 143
See Order of Release.

REVIVAL OF REPEALED STATUTE — Lord Brougham's Act—County Courts Act, 1867 - - - - - 330
See County Courts Act, 1867.

REPEAL OF STATUTES—Lord Brougham's Act, s. 5—County Courts Act, 1867 - 330
See County Courts Act, 1867.

RES JUDICATA—*Pleading — Award.*] Declaration for work done and materials provided, claiming 400*l.* Plea: Except as to 145*l.* 3*s.* 1*d.*, parcel of the money claimed, that the defendant ought not to be admitted to allege that at the commencement of this suit any more than the sum of 145*l.* 3*s.* 1*d.* was due from the defendant to the plaintiff in respect of the causes of action in the declaration mentioned, because after the accruing of the causes of action and before suit, a dispute arose between the plaintiff and the defendant as to how much was due from the defendant to the plaintiff in respect of the causes of action, and thereupon by agreement made between them they referred the question of how much was due from the defendant to the plaintiff in respect of the causes of action to the award of W. W. and agreed to be bound by his award as to such amount, and that W. W. awarded that the amount due from the defendant to the plaintiff was 145*l.* 3*s.* 1*d.* Demurrer:—*Held*, that, as the plea did not profess to answer the entire claim of the plaintiff, but was pleaded only to the excess over the sum found to be due by the award, it was a good plea, inasmuch as the award precluded either party from saying more or less was due. Commings *v.* Heard 669

RESERVATION OF RIGHTS AGAINST SURETY —*Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192—*Deed of Composition—Assent by Surety to Deed.*] To an action by an indorsee against acceptor of a bill of exchange, the defendant pleaded a deed of composition, under the Bankruptcy Act, 1861, which contained no reservation of rights against sureties. The plaintiff replied that the bill was accepted for value and indorsed to him for value, and that if he had assented to the deed he would have discharged the drawer. The defendant rejoined that before the registration of the deed the drawer consented to the plaintiff executing and becoming bound by the deed. The jury having found this issue for the defendant:—*Held*, that a deed of composition is not necessarily invalid for not containing a reservation of creditors' rights against sureties, because it cannot be assumed that there are any creditors with sureties; and although the replication shewed that the plaintiff was such a creditor, yet the rejoinder left the deed as it would have been if this fact had not appeared; and that the deed was therefore valid and binding on the plaintiff. Poole *v.* Willats 630

RESTITUTION, WRIT OF - - - 371
See Writ of Restitution.

RETURN TO AWARD—Land not injuriously affected—Lands Clauses Act, 1845 - 320
See Mandamus to take up Award.

RIGHT OF ACTION—Lex fori and lex loci—Tort committed in a colony - - 225
See Lex loci.

ROAD—Subsidence—Negligence - - 138
See Subsidence of Road.

ROADWORTHINESS OF CARRIAGE—*Carrier of Passengers — Railway Company.*] The contract made by a general carrier of passengers for hire with a passenger, is to take due care (including in that term the use of skill and foresight), to carry the passenger safely; and is not a warranty that the carriage in which he travels shall be in all respects perfect for its purpose; that is to say, free from all defects likely to cause peril although those defects were such that no skill, care, or foresight could have detected their existence. Readhead *v.* The Midland Railway Company. [Ex. Ch. 379

SALE—Bread—Sale otherwise than by weight
See Bread. 1, 2. [559, 565

SALE, BILL OF—Act of Bankruptcy—Delaying creditors - - - - 27
See Delaying Creditors.

SALE, CONDITIONS OF—Title - - 159
See Conditions of Sale.

SALE OF REAL ESTATE — Refusal of vendor to give possession—Measure of damages 659
See Refusal of Vendor to give Possession.

SALE, POWER OF—Mortgage - - 97
See Power of Sale.

SALVAGE—Decree of foreign court - 414
See Warranty of Nationality.

SANITARY ACT, 1866, s. 21 - - - 122
See Nuisances Removal Act, 1855.

SCIENTER—Mischievous animal—"Cattle"—28 & 29 Vict. c. 60, s. 1 - - 582
See "Cattle."

SECURED CREDITORS—Creditors' deed—Bankruptcy Act, 1868 - - - 271
See Bankruptcy Act, 1868.

SECURITY FOR COSTS—*Practice—Assignee suing for benefit of Creditors—Insolvent.*] The Court will not require security for costs to be given by a plaintiff who sues as the assignee of a bankrupt for the benefit of the estate, although he is in insolvent circumstances. Denston *v.* Ashton 590

SERVANT: *See* Master and Servant.

SETTLEMENT—Renting tenement — Evidence—Presumption - - - 341
See Declaration against Interest.

SEWERS—Rateability—Beneficial occupation 15
See Beneficial Occupation.

SHAREHOLDER—Companies Act, 1862 — Purchase of interest - - - 462
See Companies Act, 1862.

SHERIFF—Order of release—Bankruptcy 143
See Order of Release.

—— Election of coroner—Declaration - 559
See Coroner.

SHERIFF'S COURT—Judge—30 & 31 Vict. c. 142, s. 35 - - - - - 394
See Jurisdiction of Central Criminal Court.

SHIP AND SHIPPING—Marine insurance—Warranty of nationality—Perils of the seas [414
See Marine Insurance. Warranty of Nationality.

SHOP—"Dwelling-place or shop"—Markets, &c. Clauses Act, 1847 - - - 316
See "Dwelling-place or Shop."

SLANDER—Costs—Damages not exceeding 10*l.* [175, 643
See Damages not exceeding 10*l.* 1, 2.

SLANDER OF TITLE — *Personalty — Reasonable and Probable Cause—Admissibility of Evidence—Patent.*] The plaintiffs brought an action, alleging in the declaration that the defendant falsely and maliciously wrote to and told persons who had bought certain machines of the plaintiffs, that the machines were infringements of the defendant's patents, and that the defendant claimed royalties for the use of the machines, and that if they used the machines without paying royalties he should take legal proceedings. The defendant pleaded not guilty.—The plaintiffs, at the trial, offered to prove various specifications and machines, existing before the date of the defendant's patent, to shew that the defendant's specification claimed matters that were not new, and also that the defendant had used them. The judge ruled that, as the defendant's patent was still subsisting, and not set aside, on scire facias or otherwise, the evidence was immaterial, and directed a nonsuit:—*Held*, that the ruling of the judge was right; that where a person claims a right in himself which he intends to enforce against a purchaser he is entitled, and in common fairness bound, to give the intended purchaser warning of his intention; and that no action lies for giving such preliminary warning, unless it can be shewn, either that the threat was made malâ fide, only with the intent to injure the vendor, and without any purpose to follow it up by an action against the purchaser, or that the circumstances were such as to make

SLANDER OF TITLE—*continued.*
the bringing an action altogether wrongful. Wren *v.* Weild - - - - - - 730
—— Particulars by defendant—Practice - 213
See Particulars by Defendant.

SPECIAL CONSTABLES—*Appointment and Payment of Special Constables—Form of Order on Treasurer—1 & 2 Wm. 4, c. 41, ss. 1 & 13—Certiorari—Practice.*] By s. 1 of 1 & 2 Wm. 4, c. 41, justices are empowered to appoint special constables in the manner therein provided.—By s. 13 justices are empowered to order "at a special session to be held for that purpose" allowances to such special constables for their trouble, &c.; such order to be made on the treasurer of the county.—Special constables were appointed by justices for the county of C., but their appointment was not made in the manner pointed out by the Act. They acted, and an order on the county treasurer was made for payment for their trouble, &c., by justices then sitting for the purpose of auditing the accounts of the expenses of special constables after the business of an ordinary petty session had been concluded. No notice for the holding of any special session had been given.—The order was general in form, being a mere direction to pay, and it did not recite any of the facts which gave the justices jurisdiction to make it. The treasurer paid the amount, and the payment was afterwards allowed at quarter sessions:—*Held*, that although the appointment of the special constables was not regular, and assuming that the order for their payment was originally invalid because not made at a special session held for the purpose, yet the Court, in the exercise of its discretion, would not grant a certiorari to bring up the order, as the proceedings were completely finished and no benefit could arise from re-opening them.—*Semble*, that the session at which the order was made was not "a special session held for the purpose," within s. 13 of 1 & 2 Wm. 4, c. 41, and that the order was, therefore, originally invalid.—*Semble*, that the order was sufficient in form. The Queen *v.* Lord Newborough - - - - - 585

SPECIAL CONTRACT—Railway—Declaration of value of goods - - - 244
See Declaration of Value of Goods.

STATUTE OF GLOSTER—County Courts Act, 1867 - - - - - - 330
See County Courts Act, 1867.

STATUTE OF LIMITATIONS: *See* Limitations, Statute of.

STATUTES:
6 Edw. 1, c. 1 - - - - - 330
See County Courts Act, 1867.
21 Hen. 8, c. 11 - - - - 371
See Writ of Restitution.
43 Eliz. c. 2, s. 1 - - - - 581
See Iron Mines.
21 Jac. 1, c. 16 - - - - 653
See Limitations, Statute of.
17 Geo. 2, c. 38, s. 12 - - - 554
See Apportionment of Poor-rate.
14 Geo. 3. c. 48, s. 2 - - - 622
See Omission of Name.
35 Geo. 3, c. 101, s. 28 - - - 33
See Suspended Order of Removal.

STATUTES—*continued.*
49 Geo. 3, c. 124, s. 3 - - - 33
See Suspended Order of Removal.
58 Geo. 3, c. 69, s. 1 - - - 577
See Notice for Holding Vestry.
3 Geo. 4, c. cvi. - - - - 559
See Bread. 1.
6 Geo. 4, c. 57, s. 2 - - - 341
See Declaration against Interest.
9 Geo. 4, c. 14, s. 5 - - - 1
See Ratification by Infant.
11 Geo. 4 & 1 Wm. 4, c. 36, s. 15 - 486
See Gaoler.
11 Geo. 4 & 1 Wm. 4, c. 68, ss. 1, 6 - 244
See Declaration of Value of Goods.
11 Geo. 4 & 1 Wm. 4, c. 70, s. 21 - 149
See Arrest on Mesne Process.
1 & 2 Wm. 4, c. 41, ss. 1 & 13 - - 585
See Special Constables.
4 & 5 Wm. 4, c. 36, ss. 1 & 2 - - 394
See Jurisdiction of Central Criminal Court.
4 & 5 Wm. 4, c, 76, s. 99 - - - 285
See Order of Discharge.
—— —— s. 109 - - - - 592
See Irremoveability of Pauper.
5 & 6 Wm. 4, c. 76, s. 28 - - - 290
See Disqualification for Town Councillor.
—— —— ss. 32, 142 - - - 346
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6 & 7 Wm. 4, c. 37, s. 4 - - 559, 565
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1 & 2 Vict. c. 28 - - - - 559
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1 & 2 Vict. c. 110, ss. 1, 3 - - - 149
See Arrest on Mesne Process.
5 & 6 Vict. c. 45, ss. 1 and 4 - - 715
See Fine Art Copyright.
7 & 8 Vict. c. 92 - - - - 549
See Coroner.
7 & 8 Vict. c. 101, s. 32 - - - 285
See Order of Discharge.
8 Vict. c. 16, ss. 128—134 - - 462
See Companies Act, 1862.
8 Vict. c, 18, ss. 25, 35, 68 - - 320
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See Obstruction to Public Right.
—— —— s. 121 - - - - 190
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8 & 9 Vict. c. 118, s. 56 - - - 725
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9 & 10 Vict. c. 95, s. 128 - - - 330
See County Courts Act, 1867.
10 Vict. c. 14, s. 13 - - - - 316
See "Dwelling-place or Shop."
11 & 12 Vict. c. 63, ss. 69, 144 - - 351
See Public Health Act, 1848.
12 & 13 Vict. c. 106, s. 27 - - - 143
See Order of Release.
—— —— s. 113 - - - - 649
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—— —— s. 178 - - - - 568
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13 & 14 Vict. c. 21, s. 5 - - - 330
See County Courts Act, 1867.

13 & 14 Vict. c. 61, ss. 11, 12 - - 330
See County Courts Act, 1867.

14 & 15 Vict. c. 105, s. 3 - - - 147
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15 & 16 Vict. c. 54, s. 4 - - - 330
See County Courts Act, 1867.

17 & 18 Vict. c. 31, s. 7 - - - 244
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—— —— ss. 2 and 7 - - - 539
See Passenger's Luggage. 1.

17 & 18 Vict. c. 102, s. 2 - - - 626
See Bribery.

17 & 18 Vict. c. 125, s. 12 - - - 462
See Companies Act, 1862.

18 & 19 Vict. c. 63, ss. 9, 24, 44 - - 602
See Friendly Society.

18 & 19 Vict. c. 120, ss. 110, 111 - - 138
See Subsidence of Road.

18 & 19 Vict. c. 121, ss. 10, 11, 12 - 122
See Nuisances Removal Act, 1855.

20 & 21 Vict. c. 60, ss. 143—148 - - 257
See Irish Bankruptcy Act.

21 & 22 Vict. c. 98, ss. 12 and 14 - - 117
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—— —— ss. 55, 56 - - - 163
See Local Government Act, 1858.

22 Vict. c. 35, s. 12 - - - - 626
See Bribery.

24 & 25 Vict. c. 55, ss. 1, 12 - - 592
See Irremoveability of Pauper.

24 & 25 Vict. c. 96, s. 100 - - - 371
See Writ of Restitution.

24 & 25 Vict. c. 134, s. 73 - - - 27
See Delaying Creditors.

—— —— s. 153 - - - - 700
See Proof of Unliquidated Damages.

—— —— s. 154 - - - - 568
See Contingency.

—— —— s. 192 - - - 49, 61, 630
See Construction of Creditors' Deed.
Reservation of Rights against Sureties.
Unreasonableness of Creditors' Deed.

25 & 26 Vict. c. 68, s. 1 - - - 715
See Fine Art Copyright.

25 & 26 Vict. c. 89, ss. 161, 162 - - 462
See Companies Act, 1862.

25 & 26 Vict. c. 102, s. 33 - - - 138
See Subsidence of Road.

25 & 26 Vict. c. 103, ss. 14, 20, 25 - 326
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—— —— s. 28 - - - - 163
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26 & 27 Vict. c. 117, ss. 2, 3 - - 166
See Nuisances Removal Act, 1863.

27 & 28 Vict. c. 39, s. 1 - - - 323
See Valuation List.

27 & 28 Vict. c. 101, s. 25 - - 516
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28 & 29 Vict. c. 79, s. 8 - - - 33
See Suspended Order of Removal.

29 & 30 Vict. c. 90, s. 21 - - - 122
See Nuisances Removal Act, 1855.

30 & 31 Vict. c. 103, s. 3 - - - 209
See Factory Acts Extension Act, 1867.

30 & 31 Vict. c. 142, s. 5 - - 175, 643
See Damages not exceeding 10*l.* 1, 2.

—— —— s. 11 - - - - 4
See County Court Jurisdiction.

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—— —— s. 33 - - - - 330
See County Courts Act, 1867.

31 & 32 Vict. c. 104, s. 3 - - - 271
See Bankruptcy Act, 1868.

STURGES BOURNE'S ACT, s. 1 - - 577
See Notice for Holding Vestry.

SUBSIDENCE OF ROAD—*Negligence—Highway—Metropolitan Board of Works—Metropolis Management Acts*, 18 & 19 *Vict. c.* 120, *ss.* 110, 111; 25 & 26 *Vict. c.* 102, *s.* 33.] The defendant, under a contract with the Metropolitan Board of Works, opened a public highway, not being a turnpike road, in a metropolitan parish, for the purpose of constructing a sewer; some months after the work was finished, damage ensued to the plaintiff from his horse stumbling in a hole in the road. The filling in of the road had been properly done by the defendant, and the whole was owing to the natural subsidence of the materials, which sometimes takes place, to a greater or less degree, six months or longer after such an excavation has been filled in:—*Held* (affirming the judgment of the Court of Queen's Bench), that the defendant was not liable to the plaintiff for the damage: for that there was no obligation on the defendant by common law or statute to do more than properly re-instate the road. Hyams *v.* Webster **Ex. Ch. 138**

SURETY — Reservation of rights — Composition deed - - - - - 630
See Reservation of Rights against Surety.

SUSPENDED ORDER OF REMOVAL—*Poor—Expenses of Maintenance under* 35 *Geo.* 3, *c.* 101, *s.* 28; 49 *Geo.* 3, *c.* 124, *s.* 3; 28 & 29 *Vict. c.* 79, *s.* 8.] By 35 Geo. 3, c. 101, s. 2, if it appear to the justices that any person ordered to be removed is unable to travel through sickness, or that it would be dangerous for him to do so, they may suspend the execution of the order until they are satisfied it may be executed without danger to any person who is the subject thereof; and the charges incurred by such suspension may by the said justices be directed to be paid by the parish of settlement, in case any removal shall take place, or in case of the death of such poor person before the execution of such order. By 49 Geo. 3, c. 124, s. 3, where any order of removal shall be suspended on account of the dangerous sickness of any person thereby directed to be removed, the execution of such order shall also be suspended for the same period with respect to every other person named therein. On the 19th of November, 1860,

SUSPENDED ORDER OF REMOVAL—*continued.*
an order was obtained for the removal of J. G. and E. his wife from St. M. to S., and on the same day the order was suspended on account of the sickness of J. G., and he remained incapable of being removed until he died on the 13th of June, 1861. Shortly before J. G.'s death E. became unable to travel by reason of sickness, and continued sick until she died in April, 1867, having in March, 1866, become irremoveable under 28 & 29 Vict. c. 79, s. 8, by reason of having resided before November, 1860, for one year in St. M. without receiving parish relief. An order having been obtained after the death of E. by St. M. on S. for the expenses of maintenance of E. subsequent to the death of J. G., under 35 Geo. 3, c. 101, s. 2:—*Held*, that although the order of removal was suspended in consequence of the sickness of J. G., it continued suspended as to E., and that all the expenses of her maintenance up to March, 1866, must be paid by S.—*Held*, also, that the order for the payment of the expenses was rightly made in April, 1867, on the death of E., although she had become irremoveable in March, 1866, by virtue of 28 & 29 Vict. c. 79, s. 8. THE QUEEN *v.* SCULCOATES - - - - - 33

TELEGRAPH COMPANY—*Negligence—Liability for Mistake in Message—Privity of Contract.*] The plaintiff, a merchant in London, having a cargo of ice at Grimsby, wrote and requested R. & H. at Hull to make an offer for it by telegraph. R. & H. sent by the defendants' telegraph a message: "We can give you 23*s.* for cargo now at Grimsby;" and paid them for the transmission. By the custom of the ice trade, if an offer by telegraph is accepted, the vendor pays the vendee the cost of the message. The message was misread by the defendants' clerk in London, and was forwarded to the plaintiff—"We can give you 27*s.*," &c. The plaintiff sent the cargo round to Hull; but R. & H. refused to accept the ice except at 23*s.* The plaintiff brought an action against the defendants for the consequent damage:—*Held*, that the defendants' liability arose only from contract; that as the message was sent by R. & H. on their own account and not on behalf of the plaintiff, there was no privity between the plaintiff and the defendants, and the fact, that in the event of the plaintiff accepting the offer there was an implied understanding that he would reimburse R. & H., the cost of the message made no difference; and that the plaintiff could not maintain an action against the defendants for their negligence. PLAYFORD *v.* THE UNITED KINGDOM ELECTRIC TELEGRAPH COMPANY, LIMITED - - - 706

TENANT: *See* LANDLORD AND TENANT.

TENEMENT—Settlement by renting tenement—Evidence - - - - 341
See DECLARATION AGAINST INTEREST.

TENEMENTS—Value—County court jurisdiction
See COUNTY COURT JURISDICTION. [4

TIME FOR DISCHARGE—*Charterparty—Contract implied by Law, when Charterparty silent.*] Where a charterparty provides that the ship shall proceed to a certain port, and there, or as near thereto as she can safely get, deliver the cargo in the usual and customary manner, but is silent as to the time to be occupied in the discharge, the

TIME FOR DISCHARGE—*continued.*
contract implied by law is, that each party will use reasonable diligence in performing that part of the delivery which by the custom of the port falls upon him; and there is no implied contract that the discharge shall be performed in the time usually taken at the port. Where therefore a ship, under such a charterparty, was in the course of unloading at the port of discharge, and owing to a threatened bombardment of the port, the authorities there refused for several days to allow any more of the cargo to be landed, the loss from the delay must fall on the shipowner, and he cannot recover damages from the charterer. FORD *v.* COTESWORTH - - - - - 127

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UNION ASSESSMENT, &c., ACT, 1862—General district rates—Local Government Act, 1858 - - - - 163
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—— ss. 14, 20, 25 - - - - 326
See PAROCHIAL ASSESSMENTS.

UNION ASSESSMENT, &c., ACT, 1864, s. 1 - 323
See VALUATION LIST.

UNREASONABLENESS OF CREDITORS' DEED—*Deed of Composition—Inequality—Bankruptcy Act*, 1861 (24 & 25 *Vict. c.* 134), *s.* 192.] By a deed, with the requisite consents, &c., under the Bankruptcy Act, 1861, between the debtor of the first part, P., a creditor, of the second part, and the other creditors of the third part, the debtor covenanted to pay P. a composition of 5*s.* in the pound by two equal instalments at four and twelve months, and the debtor and P., as surety, each covenanted with the other creditors to pay them a

UNREASONABLENESS OF CREDITORS' DEED—*continued.*

composition of 5*s.* in the pound on their respective debts by two instalments as above. The debtor assigned all his effects to P., upon trust to apply the proceeds towards the payment of the above composition, and afterwards towards payment of the remaining 15*s.* in the pound of P.'s debt; it being stipulated that P. should have the advantage of this security for the remainder of his debt in consideration of his undertaking the liability of suretyship; and should stand possessed of the surplus, if any, in trust, for the debtor. It was also agreed that if P., as such surety, should arrange with any creditor to make an immediate payment of the composition payable to him with a deduction by way of discount, P. should be at liberty to repay himself out of the trust moneys the whole amount of the composition payable to such creditor. In consideration of the premises, the parties of the second and third parts released their respective debts:—*Held*, that the deed was valid and binding on non-assenting creditors under s. 192: for that there was no such inequality in P. as vitiated the deed, as the purchase of his suretyship must be taken to be an advantageous bargain for the creditors at large; and that the clause as to payment in advance was not objectionable, as it must be assumed that P. would only avail himself of it when he could do so consistently with carrying out the trusts. Bissell *v.* Jones 49

—— Construction—Deed unduly favouring debtor [61

See Construction of Creditors' Deed.

"USUALLY SOLD"—Bread - 559, 565

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VALUATION LIST—*Poor-rate—Appeal against Second Rate—Second Notice of Objection required under Union Assessment Committee Amendment Act*, 1864 (27 & 28 *Vict. c.* 39), *s.* 1.] By 27 & 28 Vict. c. 39, s. 1, it is enacted that before any appeal shall be heard by any sessions against a poor-rate, the appellant shall give twenty-one days notice, with the grounds, to the assessment committee; provided, that no person shall be empowered to appeal to any sessions against a poor-rate made in conformity with the valuation list approved by the committee, unless he shall have given the committee notice of objection against the list, and shall have failed to obtain such relief in the matter as he deems just. The appellants, having been assessed to a poor-rate in conformity with a valuation list, gave notice to the committee of their objection to the list, but the committee refused to alter the list, and on appeal the rate was confirmed, subject to a case. While the case was pending, a second rate was made in conformity with the list which remained unaltered as to the appellants, and the appellants having given the twenty-one days notice of appeal against the rate to the committee, applied to the quarter sessions to enter the appeal against the second rate, without having given a fresh notice to the committee of objection to the list:—*Held*, that a fresh notice of objection to the list was a condition precedent to the right to enter the appeal against the second rate. The Queen *v.* The Great Western Railway Company - - - - - 323

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VEXATIOUS INDICTMENTS ACT—(22 & 23 *Vict. c.* 17), *s.* 2—*Duty of Justice as to taking Recognizance of Prosecutor—Conspiracy by Members of Parliament.*] A magistrate, if he refuses to commit or bail the person charged, is bound under 22 & 23 Vict. c. 17, s. 2, to take the recognizance of the prosecutor, if the information discloses any of the offences mentioned in the statute; but he has a discretion to refuse if no indictable offence is disclosed. Where, therefore, the offence charged is that of conspiracy, by three persons, two of whom are members of the House of Lords, to deceive the House, and so to prevent the due course of justice and prejudice a third person, by making statements in the House which they knew to be false, the magistrate is right in refusing to take any proceedings: as members of either House of Parliament are not civilly or criminally liable for any statements made in the House, nor for conspiracy to make such statements. *Ex parte* Wason - - - - - 573

VOLUNTARY WINDING-UP—Companies Act, 1862 - - - - - 462

See Companies Act, 1862.

VOTING PAPERS—Municipal corporation—Election—Misnomer - - - 346

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WARRANTY OF NATIONALITY—*Ship and Shipping—Marine Insurance—Perils of the Seas—Sum paid under Decree of Foreign Court, to regain Goods—General Average—Salvage—Jurisdiction of Local Court in case of Wreck.*] The plaintiffs effected a policy of insurance in London with the defendants, on "five boxes of bar gold in the ship called the *Dutchman*, at and from London to Constantinople, including all risks from the Bank of England until safely delivered to the consignees at Constantinople." The perils insured against were the usual perils, including of the seas, with the usual suing and labouring clause. At the time the insurance was effected the *Dutchman* was an English ship, but she was transferred the next day to Russian owners, and was duly certified and became a Russian ship; neither the plaintiffs nor the defendants were aware of the change until after the voyage was at an end. The ship sailed with the gold and other cargo on board, and was stranded in Turkish territory, about 100 miles from Constantinople, and within the jurisdiction of that port. The gold was immediately landed by the captain, and deposited with the Russian consul; and the consignees were compelled in order to obtain it to make a deposit of 20 per cent. upon the gold, as security for the payment of any sum that might be awarded against them as average or salvage expenses by the Russian consular court. In Turkish territory, by capitulations

WARRANTY OF NATIONALITY—*continued.*
with the Great Powers, all matters touching ships and their cargoes are decided by the consular court of the country to which the ship belongs. After the gold had been landed, operations were commenced to get the vessel off, which proved ineffectual. But most of the cargo was saved, and many parts of the fittings of the ship. According to the practice, the Russian consul appointed a curator of the wreck; and three persons were appointed by the Russian consul to decide upon the average to be paid by all parties concerned. They found it not a case of average, but a case of salvage, and they awarded that the cargo, including the gold, must contribute to the expenses in certain proportions according to the value; and this threw by far the greater part of the expenses on the gold. The agents of the plaintiffs and defendants protested against the award, as the gold had been landed before any of the operations had been commenced; but the award was ratified by the Russian minister at Constantinople, and no notice of appeal to the court at St. Petersburg having been lodged within eight days, it became a definite judgment binding on all parties. Had the ship remained under the English flag, the expenses would have been adjusted according to English law, and a great part of the sum charged against the gold would not have been charged. The plaintiffs, having been thus obliged to pay the sum awarded against the gold, brought an action to recover a proportionate part of it from the defendants, as a partial loss by the perils insured against. In addition to the above facts, contradictory evidence was given as to what principle had been adopted in the award, and as to whether or not the proper law had been followed in the decree of the Russian consular court:—*Held*, 1. That the fact of the change of nationality of the ship could not affect the contract of insurance, as there was no express warranty or condition in the policy that the ship should continue English, and such a condition could not be implied. 2. That it was unnecessary to go into the question of whether or not the judgment of the Russian consular court was strictly according to the law administered in that court; the ship having been wrecked, the consequence was that the gold had got into the hands of the Russian authorities, and in order to get it back the plaintiffs had been compelled to pay the sum claimed, and this was the immediate consequence of the wreck; and the plaintiffs were, therefore, entitled to recover the money as a loss by perils of the sea. 3. That the plaintiffs had done all that a reasonable uninsured owner would have done, and were not bound to have appealed to the court at St. Petersburg. Dent *v.* Smith, P. C. - - - 414

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WRIT OF RESTITUTION—*Jurisdiction of Court of Queen's Bench*—21 *Hen.* 8, *c.* 11; 24 & 25 *Vict. c.* 96, *s* 100.] The Court of Queen's Bench had at common law no jurisdiction to issue a writ of restitution except as part of the judgment on an appeal of larceny; and 21 Hen. 8, c. 11, and 24 & 25 Vict. c. 96, s. 100, only confer this jurisdiction on the Court before whom the felon has been convicted. Where, therefore, a person has been convicted of housebreaking and larceny before the Central Criminal Court, the Court of Queen's Bench has no power to award a writ of restitution of the proceeds of the larceny. The Queen *v.* The Lord Mayor and Corporation of London - - - - - 371

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